(23)

No. 01-963-CSX Title: Norfolk & Western Railway Company, Petitioner
v.
Freeman Ayers, et al.

Docketed: January 7, 2002 Court: Circuit Court of West Virginia, Kanawha County

Entry	Date	Proceedings and Orders
-	Jan 2 2002	Petition for writ of certiorari filed. (Response due February 6, 2002)
	Feb 1 2002	Brief amicus curiae of Association of American Railroads filed.
	Feb 6 2002	Brief of respondents Freeman Ayers, et al. in opposition filed.
	Feb 6 2002	Lodging consisting of ten printed booklets received.
	Feb 20 2002	DISTRIBUTED for Conference of March 15, 2002
	Feb 20 2002	Reply brief of petitioner Norfolk & Western Railway Company filed.
	Feb 20 2002	LODGING consisting of twenty copies of related material received from counsel for petitioners and distributed.
	Mar 18 2002	REDISTRIBUTED for Conference of March 22, 2002
	Mar 25 2002	REDISTRIBUTED for Conference of March 29, 2002
	Apr 1 2002	Petition GRANTED. SET FOR ARGUMENT November 6, 2002. **********
	May 1 2002	Order extending time to file the joint appendix and petitioners brief on the merits to and including June 17, 2002.
	Jun 17 2002	Joint appendix filed.
	Jun 17 2002	*Joint appendix in two volumes,
	Jun 17 2002	Brief of petitioner Norfolk and Western Railway Company filed.
	Jun 17 2002	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Jun 17 2002	Brief amicus curiae of American Insurance Association filed.
	Jun 17 2002	Brief amicus curiae of Association of American Railroads filed.
	Jun 17 2002	Brief amici curiae of Coalition for Asbestos Justice, Inc., et al. filed.
	Jun 17 2002	Brief amicus curiae of Washington Legal Foundation filed.
	Jun 17 2002	Brief amicus curiae of United States filed.
	Jun 19 2002	LODGING consisting of twenty velo bound copies of related material received from counsel for the petitioner.
	Jun 19 2002	LODGING consisting of twenty bound copies of eight unpublished orders received from counsel for amicus AAR.
	Jun 19 2002	LODGING consisting of twenty copies of an article manuscript by James Henderson,entitled Asbestos Litigation Gone Mad, received from counsel for amici Coalition, et al.
	Jun 21 2002	Order extending time to file respondents' brief on the merits to and including August 19, 2002.
	Jul 24 2002	LODGING consisting of 20 copies of a related article submitted by counsel for amici Coalition for Asbestos

2pp

No. 01-963-CSX

Entry	Date	Proceedings and Orders
		Justice, et al.
	Aug 8 2002	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondents.
	Aug 16 2002	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Aug 16 2002	Brief amicus curiae of American Public Health Association filed.
	Aug 19 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 19 2002	Motion of the Solicitor General to present oral argument pro hac vice filed.
	Aug 19 2002	Brief of respondents Freeman Ayers, et al. filed.
	Aug 19 2002	Brief amicus curiae of United Transportation Union filed.
	Aug 19 2002	Brief amicus curiae of Brotherhood of Locomotive Engineers filed.
	Aug 19 2002	Brief amici curiae of West Virginia,et al. filed.
	Aug 19 2002	Brief amici curiae of American Law Professors, Richard L. Abel, et al. filed.
	Aug 19 2002	Brief amicus curiae of AFL-CIO filed.
	Aug 31 2002	CIRCULATED.
	Sep 23 2002	Reply brief of petitioner Norfolk & Western Railway Company filed.
	Oct 7 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 7 2002	Motion of the Solicitor General to present oral argument pro hac vice GRANTED.
	Oct 16 2002	LODGING consisting of twenty bound copies of related material received from counsel for the petitioner and distributed.
	Oct 22 2002	LODGING consisting of twenty copies of related material received from counsel for the respondent and distributed.
	Nov 6 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was error for the court below, in conflict with decisions of federal courts of appeals, state supreme courts and prevailing common-law principles, to award emotional-distress damages under the Federal Employers' Liability Act ("FELA") to plaintiffs who presented no evidence of physical manifestation or other corroboration of injury related to their alleged fear of cancer?

2. Whether it was error for the court below, in conflict with decisions of the federal courts of appeals, state supreme courts and evolving common-law principles, not to apportion damages under FELA among tortfeasors?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below:

Carl Butler

Doyle Johnson

John Shirley

James Spangler

Clifford Vance

RULE 29.6 STATEMENT

Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Norfolk & Western Railway Company ("N&W") respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Kanawha County, West Virginia.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The consolidated judgments for which review is sought are: *Freeman Ayers* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-6857; *Carl Butler* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-6876; *Doyle Johnson* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-8888; *John Shirley* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-8970; *James Spangler* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-7004; and *Clifford Vance* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-5829. After a jury verdict in favor of the plaintiffs, the Circuit Court of Kanawha County denied N&W's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial or Remittitur on February 14, 2001. The order of the circuit court denying N&W's motion is unpublished, and is reproduced in the Petition Appendix ("Pet. App.") at pages 3a-5a. The Supreme Court of Appeals of West Virginia denied N&W's Petition for Appeal on October 4, 2001. The supreme court's order is unpublished, and is reproduced at Pet. App. 1a-2a.

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on October 4, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, 53, and 56, are reproduced at Pet. App. 6a-7a.

STATEMENT OF THE CASE

In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), this Court held that FELA plaintiffs cannot recover damages for emotional distress related to the fear of developing asbestos-related cancer if they could not prove a "physical impact," *viz.*, the onset of a disease caused by asbestos exposure. Departing from both *Buckley* and established FELA and common-law principles adopted by federal courts of appeals and state supreme courts, the court below rendered a $5.8 million judgment against N&W in favor of the six respondents who, while arguably adducing evidence of the requisite "physical impact," presented no objective proof of any emotional injury whatsoever, much less the proof of physical or psychiatric manifestations of emotional injury that the common law has always required of plaintiffs claiming negligently inflicted emotional distress. Instead, the court upheld large judgments to respondents based on – at most – their bare testimony that they were concerned that they would eventually contract cancer from asbestos exposure; it did so even though some respondents provided *no* testimony related to any "fear" of cancer. Compounding the wrong, the court below instructed the jury that, if it found that N&W's conduct caused respondents' injuries to any degree, it should hold N&W liable for all of their damages, despite the clear presence in the record of other causes independent of their N&W employment.

This case presents two issues of critical importance to the administration of FELA, namely: (1) whether a plaintiff can recover emotional-distress damages even without any

physical manifestation or other objective medical corroboration of such distress; and (2) whether a railroad is liable for the full amount of an employee's injury on a strict theory of joint and several liability, even though the evolving common law has generally rejected such liability and there is uncontroverted evidence of non-railroad causes of his injuries.

This is the second time in approximately a year in which N&W has petitioned this Court to review these same issues. See *Norfolk & W. Ry.* v. *Dye*, 121 S. Ct. 2593 (2001) (mem.). There is a pattern of injustice and maladministration of an important federal statute in West Virginia. Because of recent mergers, there are two major eastern railroads: Norfolk Southern, the successor of N&W, which operates in 22 states and the District of Columbia, and CSX, which operates in 23 states and the District of Columbia. The plaintiffs' lawyers with FELA experience solicit former railroad employees to serve as plaintiffs in mass occupational-exposure suits. Those suits are then filed in state court in notoriously populist West Virginia jurisdictions, even though a significant number of the plaintiffs are not from West Virginia. For example, in the respondents' original complaints, at least 119 plaintiffs were from other states.

The railroads have no effective remedy against these abusive tactics. *Forum non conveniens* motions are not granted in jurisdictions particularly favored by the plaintiffs' bar, no matter how egregious the aggregation of out-of-state plaintiffs.[1] Although the claims are generally insubstantial, plaintiffs' counsel settles the vast majority of them for far less than the cost to the railroads of taking the cases to trial. Because of the sheer number of plaintiffs, the plaintiffs' counsel receives a tidy fee even though the individual

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[1] As discussed *infra*, the railroads have even fewer remedies under the asbestos-litigation management plan recently adopted by the West Virginia Supreme Court of Appeals.

plaintiff settlements are small. Those trials nonetheless result in multimillion dollar judgments against the railroads without evidentiary basis because of repeated, uncorrected errors of law and jury hostility to railroads. There is no right of appellate review in West Virginia, and, despite full briefing on the questions presented and on the conflict with other courts and with common-law principles, the West Virginia Supreme Court repeatedly denies discretionary review without comment. In a bitter irony, the plaintiffs then invoke the absence of a written appellate opinion as the reason for this Court to deny review.

This is systematic injustice and gamesmanship that demands this Court's intervention. Moreover, review is even more warranted now than in *Dye*. First, the repetition of injustice refutes the previously made claims of respondents' counsel (who was also counsel in *Dye*) that there is no broad-based problem in the West Virginia courts. Second, the conflict of authority has deepened. Third, under the asbestos-litigation management plan recently adopted by the West Virginia Supreme Court, all pending asbestos-related cases have been transferred to the court below, the Circuit Court of Kanawha County, with the substantial involvement of the judge below, the Honorable A. Andrew MacQueen, III. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001) (per curiam). Given the absence of any mandatory appellate review in the West Virginia state courts and the generous venue provisions of FELA, the extraordinary rulings of the court below will largely govern FELA liability for asbestos-related claims of the major eastern railroads (CSX and Norfolk Southern, the successor of N&W), both of which operate in West Virginia. See *infra* at 24-27. Fourth, mass complaints of this kind continue to be filed in West Virginia in the wake of *Dye*. See *infra* at 26. Thus, the immediate resolution of these issues is vital to the railroad industry, which otherwise faces exactly what the Court has sought to avoid in its recent FELA opinions: significant, unpredictable

liability for a flood of unsubstantiated claims of emotional distress.

Statutory Background

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. See *Urie* v. *Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. 45 U.S.C. § 51 (reduced standard for causation); *id.* § 53 (contributory negligence not a bar to recovery).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. See *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in character."). The scope of FELA is "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees. H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. See 45 U.S.C. § 56.

To promote this uniformity, guidance from this Court is essential to the proper administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in

delineating the unspecified bounds of recovery under FELA. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994).

The text of FELA is mostly silent on the two issues raised in this petition, and thus these are issues to be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry. *Id.* at 555-56. First, although this Court has recognized that FELA's purpose is to authorize recovery in damages for "a *serious* and negligently caused emotional harm," *Buckley*, 521 U.S. at 438 (emphasis added), and has adverted to the majority rule requiring physical manifestations of severe emotional injury, *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557, 567 n.13, 568-69 & n.18 (1987), it has not yet had occasion to adopt that rule expressly in FELA actions. See *Gottshall*, 512 U.S. at 554. Second, this Court has not yet resolved the conflict in the lower courts over whether FELA permits apportionment of liability among multiple tortfeasors. Indeed, this conflict has become even deeper since *Dye*, as the Supreme Court of Utah recently upheld a jury instruction requiring apportionment in a FELA case. See *Brewer* v. *Denver & Rio Grande W. R.R.*, 31 P.3d 557, 571 (Utah 2001). Both of these questions leave fundamental gaps in FELA doctrine that require immediate resolution.

Factual Background

The plaintiffs below, six retired employees of N&W, asserted claims against their former employer under FELA as part of large, multi-plaintiff complaints filed in West Virginia. The basis of their claims was N&W's alleged failure to provide them with a reasonably safe workplace because of their exposure to asbestos and other dusts. The plaintiffs alleged that they had contracted asbestosis, and sought damages for, among other things, a claimed concern about contracting cancer sometime in the future.

At trial, it was contested whether any of the plaintiffs had any asbestos-related condition. The plaintiffs did not present any testimony of treating physicians. Instead, a physician hired to examine the plaintiffs solely for purposes of the litigation testified that there were indications of asbestosis, a set of lung disorders from the inhalation of asbestos dust. The plaintiffs' medical witnesses also testified that the plaintiffs' workplace exposure to asbestos may have caused their asbestosis. They also testified that asbestos exposure is correlated with cancer. Significantly, none of the plaintiffs' witnesses testified that asbestosis itself increases the risk of cancer.

Indeed, other medical evidence at trial established that there are four separate disease processes associated with exposure to asbestos: asbestosis, pleural thickening, malignant mesothelioma (a rare cancer of the lining of the lung cavity), and certain other cancers. Although all these diseases may be associated with the same asbestos exposure, none evolves into the other and there is no established connection among the diseases (*i.e.*, asbestosis does not turn into lung cancer or mesothelioma). The fact that asbestosis and asbestos-related cancer are separate diseases that are not medically linked has also been widely recognized among courts. See, *e.g.*, *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984) (asbestosis itself does not lead to an increased risk of cancer); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983) ("asbestosis and lung cancer are separate and distinct latent diseases that are not medically linked").[2]

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[2] *See also Joyce* v. *A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (Ginsburg, J.); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495, 501 (N.J. Super. Ct. Law Div. 1985); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985).

The parties also disputed whether N&W had been negligent at all, and whether the plaintiffs had experienced substantial exposure to asbestos during their railroad employment that caused their alleged current conditions. Specifically, Respondent John Shirley worked for N&W primarily as an office clerk with minimal or no exposure to asbestos. Furthermore, there was extensive testimony that two of the plaintiffs had far more substantial exposure to asbestos fibers during decades of subsequent employment elsewhere. Respondent Carl Butler worked at N&W for only three years in the 1950s. Butler testified at trial that he was not aware of having ever been exposed to asbestos at N&W, but that he could have been exposed to asbestos during a three-month period in 1951. Butler later worked as a union pipefitter for other employers for 33 years, and testified that he had substantial exposure to asbestos at subsequent places of employment. Respondent Freeman Ayers testified that he had last worked for N&W in 1962, and subsequently worked in automotive maintenance with frequent direct exposure to asbestos. The plaintiffs testified as to other contributing factors to their alleged injuries, including smoking up to two packs of cigarettes per day for up to 60 years. The plaintiffs also had concurrently filed separate lawsuits against numerous asbestos manufacturers in various West Virginia counties. In those lawsuits, pleadings from which are part of the record below, the plaintiffs alleged that their injuries were the "sole, direct, and proximate result" of the acts and omissions of the manufacturers.

The parties also contested whether any of the plaintiffs had suffered any emotional distress. The plaintiffs testified as to varying degrees of concern about contracting cancer. Respondents Butler, Johnson, Shirley, and Vance testified that, at most, they had a "concern" about cancer. For example, Vance testified only that "it makes me think, occasionally." Butler testified that what worried him the most about cancer was "if there's nobody to take care of the farm

or anything." Respondent Ayers did not testify as to having even a concern about contracting cancer. When asked if he had any worry or concern, Ayers testified, "Well, I have an insurance policy that I've had for years for cancer, if I get it." Respondent Spangler offered no testimony at all regarding any concern about contracting cancer. Indeed, none of the plaintiffs testified as to even having a "fear" of cancer. Furthermore, not only did none of the plaintiffs testify as to the existence of severe emotional injury, but none presented evidence of any emotional or physical manifestation of their concerns, or any other objective corroboration of their bare assertions of emotional distress.

Despite this lack of supporting evidence, the court below denied N&W's motion to exclude all evidence regarding cancer at trial due to its irrelevant and highly prejudicial nature. Throughout the trial and in closing arguments, the plaintiffs' counsel emphasized the need to compensate respondents for their fear of cancer.

The court below instructed the jury that, despite the lack of evidence that any of the plaintiffs actually had cancer or reasonably might develop cancer in the future, that any plaintiff who had a reasonable fear of cancer that was related to proven physical injury from asbestos was entitled to be compensated for that fear as a part of damages for "emotional pain and suffering related to physical injury." The jury was further instructed to find N&W liable if its negligence contributed "however slightly to the plaintiff's injuries," and "not to make a deduction for the contribution of the nonrailroad exposure." The jury returned a verdict in favor of the plaintiffs, collectively awarding them $5,810,606 against N&W.

The State Court Decisions

The court below upheld the jury verdict in favor of the plaintiffs in an order entered on February 14, 2001. Pet. App. 4a. The Circuit Court provided no written opinion in support

of its order. Having no right of appellate review (for there are no intermediate appellate courts in the West Virginia state court system), N&W petitioned the West Virginia Supreme Court of Appeals for review of the Circuit Court's decision. As had happened previously in *Dye*, the West Virginia Supreme Court of Appeals denied review without comment on October 4, 2001. *Id.* at 1a-2a.

REASONS FOR GRANTING THE PETITION

FELA is not intended to transform railroad employers into the "insurers of the emotional well being and mental health of their employees." *Gottshall*, 512 U.S. at 554; see also *Buckley*, 521 U.S. at 438 (courts "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"). As the cases below illustrate, the West Virginia courts continue to cross the line and greatly expand the proper recoveries for employees under FELA. Plaintiffs from any state where Norfolk Southern or CSX operates now bring suits in West Virginia to recover for allegations of emotional distress without presenting any corroborating evidence of any such injury – much less even testifying on the subject. Moreover, the West Virginia courts have denied apportionment of any of these ever-increasing damages among other tortfeasors, even in cases in which the railroad employer is at best marginally responsible for the employee's injuries. As a result, railroad employers are broadly liable to their employees for health problems arising over the course of their entire lives, and not just their term of employment.

The court below has joined other state and federal courts in adopting these legal standards of liability and apportionment in conflict with the decisions of other lower courts and principles embodied in this Court's decisions. Only by resolving this conflict can the Court ensure that FELA is given the "uniform application throughout the country

essential to effectuate its purposes." *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952).

I. THE COURT SHOULD RESOLVE THE CONFLICT OF AUTHORITY AS TO WHETHER FELA PLAINTIFFS MAY RECOVER EMOTIONAL-DISTRESS DAMAGES WITHOUT ANY CORROBORATING MANIFESTATION OF EMOTIONAL INJURY.

Section 1 of FELA states that employers "shall be liable in damages to any person suffering injury." 45 U.S.C. § 51. The statute does not define the term "injury" – much less its specific meaning for claims of negligent infliction of emotional distress. Based on its review of common-law developments, this Court has recognized that emotional distress is a compensable injury under FELA. *Gottshall*, 512 U.S. at 550. In *Gottshall* and *Buckley*, the Court was careful to embrace one common-law limitation, the "zone of danger" test. However, the Court has not directly addressed the other vital common-law limitation on emotional-distress claims: namely, that emotional injury, in order to be compensable, must be corroborated by physical manifestations (or objective medical symptoms) of injury. In conflict with other courts, the court below failed to vindicate this limitation by awarding millions of dollars based solely on the bare, subjective testimony of the plaintiffs regarding their "fear" of cancer.[3] It

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[3] Petitioner does not challenge in this petition the right of the jury to determine whether respondents should be awarded damages for pain and suffering or medical expenses arising from the asbestosis itself (such as shortness of breath). Nonetheless, even if those were permissible bases of recovery, the error in instructing the jury that it may award damages for fear of cancer without any physical manifestation of emotional injury requires reversal of the entire judgment. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless"); *Yazoo & Miss. Valley R.R.* v. *Mullins*, 249 U.S.

is imperative that this Court intervene to prevent this unwarranted expansion of FELA liability.

The court below turned a blind eye to sound common-law principles in allowing recovery for uncorroborated emotional injuries. As an initial matter, the court ignored this Court's decision in *Gottshall* in awarding the plaintiffs pain and suffering damages for their "fear of cancer" claims. Pain and suffering "traditionally have been used to describe sensations *stemming directly* from a physical injury or condition." *Gottshall*, 512 U.S. at 544 (internal quotation marks omitted) (emphasis added). The plaintiffs claimed to have contracted only asbestosis, which does not lead to cancer. See, *e.g.*, *Jackson*, 727 F.2d at 517; *Pierce*, 464 A.2d at 1025. Although the physical injury of asbestosis and the claimed emotional injury of fear of cancer may arise from the same asbestos exposure, fear of cancer is not distress that stems directly from the asbestosis, and therefore it should not be compensable as pain-and-suffering damages from the asbestosis itself. See *Gottshall*, 512 U.S. at 544 (negligent infliction of emotional distress contemplates mental and emotional injury that is "not directly brought about by a physical injury"); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (characterizing pain-and-suffering damages as "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to the injury*") (emphasis added). As a result, the court below could only have awarded damages for fear of cancer as a form of negligently inflicted emotional distress. See *id.* at 807-08 (analyzing parasitic pain-and-suffering damages as distinct from claim for nonparasitic damages for emotional distress for asbestos exposure). But, regardless of whether damages are awarded as pain and suffering, or as a separate claim for negligent infliction of emotional distress, common-law limits on recovery that are consonant with the purposes of FELA

531, 533 (1919) (same); *see also United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926).

must be observed. *Gottshall*, 512 U.S. at 557; *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

A. FELA Incorporates Common Law Limitations On Emotional-Distress Damages.

When the common law recognized the tort of negligent infliction of emotional distress, the courts placed two types of severe restrictions on recovery.[4] First, the common law limited the kind of conduct that was actionable. See *Gottshall*, 512 U.S. at 546-49 (describing the three principal tests for actionable conduct as requiring a "physical impact" upon the plaintiff, placement of the plaintiff in a "zone of danger," or endangerment of a "relative bystander"); *Restatement (Second) of Torts* § 436 (1965). Second, the common law restricted the type of negligently inflicted emotional injuries that are compensable, requiring plaintiffs to present some objective evidence of a manifestation of their injuries. "[T]he negligent actor is not liable when his conduct results in the emotional disturbance alone, without the bodily harm or other compensable damage." *Id.* § 436A & cmt. a; see also *id.* § 436 cmt. d (requiring proof that "the negligent conduct be a substantial fact[or] in bringing about the fright and that the fright also be a substantial factor in bringing about the illness"). Most jurisdictions continue to adhere to the requirement of physical manifestations (or objective,

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[4] The common law long forbade the recovery of emotional-distress damages, a rule said to "'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.'" *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916) (quoting *Cooley on Torts* 94 (3d ed.)). This traditional reluctance derived from the distinctive nature of emotional distress in comparison with physical injuries: (1) it is often temporary and relatively trivial; (2) it is less ascertainable, and therefore more easily falsified or imagined; and (3) it is less apparent, and therefore operates as a more remote consequence of a defendant's action. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984); *see also Gottshall*, 512 U.S. at 545.

medically diagnosed symptoms) of emotional injury as a prerequisite of recovery.[5]

In *Gottshall*, the Court faced the question of whether claims for negligent infliction of emotional distress are cognizable under FELA, and in what circumstances. 512 U.S. at 544. In light of FELA's remedial purpose, the Court interpreted the employee's statutory entitlement to recover for "injury" caused by the railroad's negligence to include emotional injury, for "severe emotional injuries can be just as debilitating as physical injuries." *Id.* at 550 (internal quotation marks omitted). This Court recognized the two major restrictions at common law on emotional-distress damages, noting that "[c]ourts . . . have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). In *Gotshall*, the second limitation (on the kind of emotional injuries that are compensable) was not in dispute. See *id.* at 536-37, 539. This Court addressed the second limitation only in the context of rejecting the claim that the genuine-injury requirement obviated the need to restrict what conduct is actionable. *Id.* at 552. Accordingly, this Court restricted the kind of conduct that was actionable (and thus the type of plaintiffs who could sue), adopting the "zone of danger" test as the standard most consonant with FELA. *Id.* at 554-56.

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[5] Mary Donovan, Comment, *Is The Injury Requirement Obsolete In A Claim For Fear Of Future Consequences?*, 41 UCLA L. Rev. 1337, 1363-68 (1994); *Payton* v. *Abbot Labs.*, 437 N.E.2d 171, 174-75 & n.5 (Mass. 1982); *see, e.g., First Nat'l Bank* v. *Drier*, 574 N.W.2d 597, 600 (S.D. 1999); *Beynon* v. *Montgomery Cablevision Ltd. P'ship*, 718 A.2d 1161, 1163 (Md. 1998); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Barnhill* v. *Davis*, 300 N.W.2d 104, 107-08 (Iowa 1981); *Corso* v. *Merrill*, 406 A.2d 300, 304 (N.H. 1979); *see also Restatement (Second) of Torts* § 436A cmt. c (1965).

In *Buckley*, the Court elaborated on the meaning of the term "physical impact" in the context of toxic exposure. 521 U.S. at 430. Despite his exposure to asbestos during his employment, Buckley did not allege that he suffered from any asbestos-related disease or exhibited any physical or psychiatric symptoms resulting from his asbestos exposure. The Second Circuit had allowed recovery for emotional distress because (1) Buckley presented some objective proof of an injury apart from his own testimony; and (2) Buckley's contact with asbestos constituted a "physical impact." *Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337, 1346 (2d Cir. 1996), *rev'd*, 521 U.S. 424 (1997). This Court addressed only the second ground in reversing the Second Circuit:

> The case before us . . . focuses on the italicized words "physical impact." . . . In our view, however, the "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time – where that substance, or related circumstance, threatens no harm other than that disease-related risk.

Buckley, 521 U.S. at 430. Other than to reiterate *Gottshall*'s admonition that the test for the genuineness of emotional injury "alone" is insufficient to safeguard defendants from meritless claims, *id.* at 434, the Court in *Buckley* did not address the fundamental requirement that emotional injury be corroborated by some objective manifestation.

The Court has previously acknowledged the importance of this unresolved question in cases decided on alternative grounds. In *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557 (1987), the Court recognized that "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *Id.* at 567 n.13; see also *id.* at 568-69 & n.18. The Court later noted in *Gottshall* that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff

demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see *id.* at 544 ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.").

Justice Ginsburg twice has separately encouraged the resolution of this exact question: "a solution the Court does not explore . . . would be to require such 'objective medical proof' and to exclude, as too insubstantial to count as 'injury,' claims lacking this proof." *Id.* at 571 (Ginsburg, J., dissenting). In *Buckley*, Justice Ginsburg found that Buckley's contact with asbestos constituted a "physical impact," but concurred in the denial of recovery "because Buckley did not present objective evidence of severe emotional distress." 521 U.S. at 445 (Ginsburg, J., concurring in part and dissenting in part). Thus, the Court has yet to address directly this fundamental element of an emotional-distress claim, but it should do so now not only to redress the clear injustice of the judgment below but also to resolve a decisional conflict among the lower courts.

B. This Court Should Resolve The Conflict Of Authority Over Whether FELA Limits Recovery To Objectively Manifest, Severe Emotional Injury.

Despite the clarity of the common law rule, there is considerable disarray among the courts of appeals and the state courts over what emotional injuries are compensable under FELA. The decision below is in direct conflict with decisions of the First Circuit and state supreme courts that hew to the traditional requirement that emotional injuries are compensable only if manifested in some form. See *Moody* v. *Maine Cent. R.R.*, 823 F.2d 693, 696 (1st Cir. 1987) (rejecting claims of injury "manifested only by subjective pain" and

unsupported by "any medical opinion as to causation"); *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977) ("If there is to be compensation for nervousness, depression, or other mental conditions . . ., there must be evidence from which a jury can make an informed judgment as to the existence, nature, duration and seriousness of the condition."); *Vance* v. *Consolidated Rail Corp.*, 652 N.E.2d 776, 784 (Ohio 1995) (finding actionable emotional distress claim under FELA where, "[a]s a preliminary matter," there was "'sufficient medical evidence to establish that plaintiff was suffering from chronic and disabling depression'"); *Alabama Great S. R.R.* v. *Jackson*, 587 So. 2d 959, 965 (Ala. 1991) (upholding award of damages where "the consequences of th[e] injury caused . . . various physical problems"); *McMillan* v. *National R.R. Passenger Corp.*, 648 A.2d 428, 433 n.3 (D.C. 1994) (FELA plaintiff must show "serious and verifiable" emotional injuries); cf. *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1202 (10th Cir.) (requiring, in non-FELA action, evidence of a "chronic objective condition caused by their increased risk of developing cancer to permit their recovery for emotional distress damages"), *cert. denied*, 531 U.S. 825 (2000). The decision below is also in conflict with two Fifth Circuit decisions under the Jones Act,[6] the first of which required evidence of "serious mental distress" without addressing the precise nature of injury that would be compensable, *Hagerty* v. *L & L Marine Services, Inc.*, 797 F.2d 256, 256 (5th Cir. 1986), and the second of which upheld dismissal of a claim for intentional infliction of emotional distress because the plaintiff "failed to prove she suffered any physical manifestations of her alleged emotional injury," *Martinez* v. *Bally's Louisiana, Inc.*, 244 F.3d 474, 477-78 (5th Cir. 2001).

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[6] The Jones Act incorporates FELA doctrine, and precedent under one Act governs cases brought under the other. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

On the other side of the coin, the Second Circuit, although not going so far as the court below, has rejected the requirement of physical injury or medically diagnosed symptoms, allowing recovery if there is *any* objective evidence (no matter how thin) corroborating the plaintiff's subjective testimony that asbestos exposure caused him fear and anger (such as a contemporaneous complaint to a supervisor about negligent conduct). *Buckley*, 79 F.3d at 1346, *rev'd on other grounds*, 521 U.S. 424 (1997). In a statute of such importance to railroads and railroad workers alike, with broad venue provisions that invite forum shopping, it is imperative that this Court resolve this conflict and uncertainty now.

The Court is faced not only with considerable conflict and uncertainty on this issue in the federal and state courts, but also a serious threat to the important policies underlying its recent restrictions on emotional-distress claims under FELA. In *Gottshall*, the Court adopted the "zone of danger" test in order to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557 (citation and internal quotation marks omitted). In *Buckley*, the Court considered these policy goals at length in justifying its further restriction on emotional-distress claims. 521 U.S. at 433-34. Specifically, the Court noted that these policy goals would be eviscerated where, "apart from Buckley's own testimony, there was virtually no evidence of distress." *Id.* at 433. If plaintiffs here are allowed to recover on uncorroborated claims of emotional distress, the Court's reasonable effort to restrict FELA claims will become a nullity. Requiring corroborating evidence of an emotional-distress claim addresses these problems and best serves the underlying purpose of FELA: the compensation of employees who suffer actual and serious injuries.

Although this case comes from a trial court's judgment, it is a perfect vehicle for resolving the issue that has vexed the lower courts and that this Court has reserved. It is inconceivable that there will ever be a case where there is less evidence suggesting cognizable emotional injury than here. Indeed, some of the plaintiffs offered *no* testimony regarding any "fear" of cancer – much less any manifestation thereof. Under the ruling below, practically every former railroad worker with asbestosis is *ipso facto* entitled to seek emotional-distress damages, even if he disavows any true "fear" of getting cancer. In West Virginia, FELA has already become a worker-insurance statute without limit, and railroads have been and will be exposed to a "flood of relatively trivial claims [for which] liability may be imposed for highly remote consequences of a negligent act." *Gottshall*, 512 U.S. at 545. In sum, this Court should act now to resolve the conflict of authority, eliminate the injustice of the unlawful judgments below, and properly limit the sweep of emotional-distress claims under FELA.

II. THIS COURT SHOULD RESOLVE THE SQUARE CONFLICT OF AUTHORITY ON THE CRITICAL QUESTION OF APPORTIONMENT OF DAMAGES UNDER FELA.

The court below instructed the jury that, if it found N&W in the slightest degree liable for respondents' asbestos-related injuries, it should hold N&W liable for 100% of the damages despite uncontroverted evidence of numerous other causes of respondents' injuries. The court justified its instruction based on the language of FELA and the traditional concept of joint and several liability, which is still recognized in only a minority of jurisdictions – including West Virginia. As railroad employers now face substantial liability for entirely uncorroborated claims and as long-term occupational-exposure claims under FELA have multiplied, apportionment has become a vital issue of law that remains unanswered in the FELA context. The decision below is in square conflict

with that of the Supreme Court of Pennsylvania, which requires apportionment of damages in FELA asbestos cases, and also conflicts with the reasoning of the Fourth, Seventh, and Tenth Circuits and the supreme courts of Nebraska and Utah, all of which have apportioned damages so that a FELA defendant is responsible only for those injuries its negligence caused. Resolution of this question is critical given that Pennsylvania and West Virginia are adjoining states, and the plaintiff's bar has every incentive and ability to shift Pennsylvania asbestos-related claims to the West Virginia courts. See *infra* at 24-27.

The history and language of FELA suggest that damages should be apportioned among those who are responsible for the injuries of an employee. FELA's adoption of a comparative negligence regime was radical at the time. See 45 U.S.C. § 53; see also *Mondou* v. *New York, New Haven, & Hartford R.R.*, 223 U.S. 1, 49-50 (1912); *Coats* v. *Penrod Drilling Corp.*, 61 F.3d 1113, 1147-48 (5th Cir. 1995) (en banc) (Garwood, J., dissenting). Under FELA, a railroad carrier shall be liable to "any person suffering injury *while he is employed by such carrier*," and not for injuries suffered outside the scope of employment. 45 U.S.C. § 51 (emphasis added). This statutory framework, together with this Court's construction of FELA in accordance with evolving principles of common law, require a departure from the strict principles of joint and several liability and the establishment of some standard of apportionment in FELA actions.

The Supreme Court of Pennsylvania has recognized the necessity of apportionment of damages under FELA. In *Dale* v. *Baltimore & Ohio Railroad*, 552 A.2d 1037 (Pa. 1989), the plaintiff sued his employer for injuries caused in part by his exposure to asbestos in the course of his employment. The Supreme Court of Pennsylvania noted that 45 U.S.C. § 51, in isolation, did not clearly call for apportionment where "the railroad's negligence was not the cause of all of the damages." *Id.* at 1041. The court resolved this ambiguity

based on its reading of 45 U.S.C. § 53, which specifically mandates apportionment for a plaintiff's contributory negligence:

> If there is a statutory requirement that FELA awards shall be diminished by the amount of an employee's contributory negligence, it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused. Thus, we hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id. This holding is in square conflict with the decision below.

The Seventh Circuit also apportioned damages where a FELA plaintiff was seeking recovery for two injuries – only one of which was caused by his employer's negligence. *Shupe* v. *New York Cent. Sys.*, 339 F.2d 998 (7th Cir. 1965). The Seventh Circuit held that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's alleged negligence." *Id.* at 1000. In these circumstances, the plaintiff "ha[s] the burden of proving what proportion, if any, of the alleged [damages] was caused by the [defendant's negligence]." *Id.*

Similarly, in a case decided after *Dye*, the Supreme Court of Utah recently affirmed a jury instruction to apportion damages where a FELA plaintiff was seeking recovery for carpal tunnel syndrome. *Brewer*, 31 P.3d at 571. The trial court had "directed the jury to limit its award of damages to those injuries caused by the railroad's negligence. . . . and to refrain from awarding 'damages arising from symptoms

associated with a condition that was not caused by any negligence.'" *Id.* Notably, the court upheld this instruction despite the fact that it conflicted with Utah law, because the plaintiff "brought suit in this case under [FELA]." *Id.* at 571 n.7.[7]

On the other side of the divide, some courts have refused to apportion damages in FELA actions based on the traditional concept of joint and several liability. Under joint and several liability, a defendant is liable for the entire amount of damages, and must then seek contribution or indemnity from the other tortfeasors. The Fifth Circuit has interpreted FELA to incorporate the traditional rule of joint and several liability. *Coats*, 61 F.3d at 1134. The court reached this conclusion based on a statutory interpretation in direct conflict with that employed by the Supreme Court of Pennsylvania: "section 53 of the FELA provides that a plaintiff may recover the total amount of his judgment less that part representing his own contributory negligence. There is no exception in [FELA] for cases in which one or more of the defendants fails to pay its share." *Id.* (internal citation omitted). In dissent, five of the judges believed that apportionment might be permitted in FELA actions, particularly in light of the statutory consideration of comparative fault between the plaintiff and defendant. *Id.* at 1169-70 (Garwood, J., dissenting). Other courts have followed suit. See, *e.g.*, *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299, 305 (8th Cir. 1990); *Gaulden* v. *Burlington N., Inc.*, 654 P.2d 383, 391 (Kan. 1982); see also *Stevens* v. *Bangor & Aroostook R.R.*, 97 F.3d 594, 602 (1st Cir. 1996).

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[7] Courts have also apportioned damages in FELA actions involving pre-existing conditions. *See, e.g.*, *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1493 (10th Cir. 1996); *Varhol* v. *National R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990); *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632, 632 (4th Cir. 1969); *Gustafson* v. *Burlington N. R.R.*, 561 N.W.2d 212, 219-20 (Neb. 1997).

There is thus a square and mature – and, since *Dye*, even deeper – conflict among federal courts of appeals and state supreme courts that this Court should resolve. Resolution of this conflict is all the more imperative because the strict rule of joint and several liability followed by the court below is anachronistic. In the absence of express statutory provisions, the Court's duty in interpreting FELA "is to develop a federal common law of negligence . . . informed by reference to the *evolving* common law." *Gottshall*, 512 U.S. at 558 (Souter, J., concurring) (emphasis added).

Joint and several liability unfairly allocates all risk of uncollectible judgments upon named defendants. FELA defendants are particularly vulnerable in these respects, since they are often the only named defendant and have been held liable for "even the slightest" causation of an employee's injury. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Indeed, only 14 states – including West Virginia – have retained the pure form of joint and several liability. See *Restatement (Third) of Torts: Apportionment of Liability* § 17, reporter's note at 151 (2000). Sixteen states have adopted pure several liability, which holds each defendant responsible only for its proportional share of the plaintiff's injuries. *Id.* at 154. For example, Colorado law now provides that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury." Colo. Rev. Stat. Ann. § 13-21-111.5(1) (West 2000). Twenty states have taken intermediate positions between several and joint and several liability, but even many of these provisions hold defendants severally liable under most circumstances. See, *e.g.*, Cal. Civ. Code § 1431.2 (several liability except for economic damages in certain actions); Conn. Gen. Stat. § 52-572h (several liability, except that plaintiff unable to collect for one year may seek

reapportionment of uncollectible share); N.Y. C.P.L.R. 1601 (several liability if defendant 50% or less at fault).

State courts hearing FELA actions are required to apply federal law. See *Dice*, 342 U.S. at 361 ("State laws are not controlling in determining what the incidents of [a FELA] federal right shall be."). In clear defiance of this directive, the court below applied the minority position still followed in West Virginia in finding N&W jointly and severally liable for highly prejudicial claims based on scant, uncorroborated evidence. As a result of this clear error, N&W is now solely responsible for massive damage awards to former employees, some of whom had minimal or no exposure to asbestos at N&W or had been exposed to asbestos for far longer periods of time after their short-term employment with N&W decades ago, or whose lung disorders are largely attributable to their own smoking habits. If this claim had been brought across the border in Pennsylvania, N&W's liability would have been a tiny fraction of what it is. That is precisely the situation when review by this Court is particularly warranted.

III. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW WILL CONTROL LIABILITY AND APPORTIONMENT OF DAMAGES FOR THOUSANDS OF OCCUPATIONAL EXPOSURE CLAIMS FILED IN WEST VIRGINIA.

The two issues discussed above amply justify certiorari in this case. But, in addition, this Court must take into account the realities of current litigation, and the strong likelihood that the ruling below (if unchecked) will largely control the asbestos-related liability of the two major eastern railroads, Norfolk Southern and CSX, both of whom operate in West Virginia. The need for the Court's review of these issues has become even greater since *Dye*. Not only is there a deeper conflict of authority, but the recent implementation of a litigation management plan in West Virginia has transferred

all statewide asbestos-related litigation to the court – and in large part to the judge – below.

The plaintiffs' bar is now highly coordinated, and actively solicits plaintiffs for suits in favorable jurisdictions as part of a plan of "assembly-line litigation" to mass-produce tort claims for "lottery-size verdicts" against corporations. Mike France, *The Litigation Machine*, Bus. Wk., Jan. 29, 2001, at 116, 120, 122-23. The railroad plaintiffs' bar has employed these tactics in asbestos-related FELA actions, and has targeted certain jurisdictions where large judgments are routinely entered against railroads by juries and upheld by trial judges. Indeed, the popularity of West Virginia courts with the plaintiffs' bar is evident from a recent administrative order of the West Virginia Supreme Court of Appeals (a copy of which was lodged with the Court by petitioner in *Dye*). That order declares that there are over 25,000 asbestos-related actions (including 2,500 asbestos-related actions against railroads) currently pending in West Virginia (many involving out-of-state plaintiffs, as discussed below). Administrative Order Re: Motion To Refer Asbestos Litigation To The Mass Litigation Panel ¶¶ 2, 11 (W. Va. Dec. 28, 2000) (Petitioner's Lodging Tab A, *Norfolk & W. Ry.* v. *Dye*, 121 S. Ct. 2593 (2001) (No. 01-1637)). See also *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 303 (W. Va. 1996) (noting that asbestos-related actions "threaten to cripple the common law system of adjudication, if for no other reason by the sheer volume of cases"). Moreover, railroads have no right of appellate review of these actions in the two-tiered West Virginia court system, and the elected West Virginia Supreme Court of Appeals (as was true here and in *Dye*) frequently declines review. See, *e.g.*, Pet. App. 1a-2a.

As a result, the plaintiffs' bar is increasingly ushering former railroad employees from other states into the courts of West Virginia to take full advantage of rulings of this kind. Indeed, as indicated by copies of FELA complaints lodged

with the Court by N&W in *Dye*, literally *thousands* of out-of-state plaintiffs have filed FELA claims in West Virginia in recent years involving allegations of asbestos exposure and emotional distress therefrom. This trend continues unabated in the wake of *Dye*. For example, CSX was recently named the defendant in a FELA asbestos-related action brought by 917 plaintiffs, only 177 of whom are residents of West Virginia. Complaint, *Abbott* v. *CSX Transp., Inc.*, No. 01-C-162M (Marshall County Cir. Ct., W. Va. Aug. 1, 2001). Norfolk Southern was recently named the defendant in a FELA asbestos-related action brought by 365 plaintiffs, only 15 of whom are residents of West Virginia. Complaint, *Adkins* v. *Norfolk S. Ry.*, No. 01-C-183(1-365) (Brooke County Cir. Ct., W. Va. Sept. 13, 2001). The *in terrorem* effect of large mass tort actions creates undue pressure on defendants to settle even meritless claims. Cf. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.).

Due in part to this flood of FELA litigation, the West Virginia Supreme Court of Appeals recently adopted a litigation management plan to handle the uncontrollable number of asbestos-related claims in its court system. Of particular significance, this plan transfers all pending statewide asbestos-related litigation to the court below, the Circuit Court of Kanawha County. See *State ex rel. Allman*, 551 S.E.2d at 372. Moreover, the judge below, the Honorable A. Andrew MacQueen, III, was called out of retirement "to conduct as many trials . . . as [he] is desirous of conducting and as time and circumstances permit." *Id.* at 375. As a result, the judgment below is of utmost significance on the critical issues for which review is sought.

Now that the court below has ruled that multimillion dollar judgments are proper for any plaintiff with asbestos-related symptoms without a showing of any severe emotional injury, and denied apportionment, there can be no doubt that the West Virginia courts will be the principal locus for FELA

litigation against the major eastern railroads. The railroads have no recourse from this mandated forum, because FELA actions may be brought in any district "in which the defendant shall be doing business at the time of commencing such action," 45 U.S.C. § 56, and may not be removed to federal court. See 28 U.S.C. § 1445(a). Thus, the decision below for all practical respects will govern the asbestos-related liability of Norfolk Southern and CSX in future litigation involving thousands of employees. Because these important and pressing issues will recur in thousands of cases, this Court should intervene to clarify the limits on railroad liability for emotional-distress damages and to ensure that compensation for these claims is fair and just.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

No. 011209

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th of October, 2001, the following order was made and entered:

CLIFFORD VANCE, JAMES SPANGLER, FREEMAN AYERS, DOYLE JOHNSON, JOHN SHIRLEY, CARL BUTLER,
Plaintiffs Below, Respondents

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, et al.,
Defendants Below

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,
Defendant Below, Petitioner

On a former day, to-wit, August 13, 2001, came the petitioner, Norfolk and Western Railway Company, by Huddleston, Bolen, Beatty, Porter & Copen, Fred Adkins and Rodney Baker, II, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 27th day of February, 2001, with the record accompanying the petition. Thereafter, on the 28th day of August, 2001, came the respondents, Clifford Vance, James Spangler, Freeman Ayers, Doyle Johnson, John Shirley, and Carl Butler, by James A. McKowen and Geraldine M. Guerin, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Maynard would grant.

A True Copy

Attest: /s/ Rory J. Perry II
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JAMES SPANGLER	CIVIL ACTION NO. 93-C-7004
FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs.

v.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, et al.,

Defendants.

ORDER GRANTING NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO VACATE ENTRY OF ORDERS DENYING MOTION FOR NEW TRIAL

On February 12, 2001, came the defendant, Norfolk Southern Railway Company (hereinafter NSRC or defendant), by counsel Fred Adkins, and the plaintiffs, by counsel James McKowen, for a hearing on NSRC's duly noticed Motion to Vacate Entry of Orders Denying Motion for New Trial pursuant to Rule 60(b) W.Va. R.C.P. After reviewing the Motion filed herein, hearing oral arguments of counsel, and being otherwise fully advised, the Court is of the opinion to grant NSRC's Motion to Vacate Entry of Orders Denying Motion for New Trial.

The Court finds that multiple mistakes and excusable neglect requires the Court, in the interest of justice, to vacate the orders Denying Motion for New Trial entered September 12, 2000 and November 13, 2000. The record establishes that

multiple orders have been entered with conflicting dates without required notice with the result of unavoidable prejudice to defendant. Rule 60(b), W.Va. R.C.P., is to be liberally construed for the purpose of accomplishing justice and it was designed to facilitate the desirable legal objective that cases are to be decide on the merits.

Wherefore, for the reasons stated herein and for other reasons appearing to the Court which justify relief from the operation of the judgment, it is ORDERED that the Orders Denying Motion for New Trial entered September 12 2000 and November 13, 2000 be and the same are hereby ORDERED VACATED. The Court has again considered NSRC's Motion for Judgment as a Matter Of Law or, in the Alternative, for a New Trial or Remittitur and is of the opinion to deny said motion, accordingly NSRC's Motion for Judgment as a Matter Of Law or, in the Alternative, for a New Trial or Remittitur is hereby DENIED. The objections of parties adversely affected by this Order are hereby noted.

The Clerk is directed to provide a copy of this Order to all counsel of record.

Enter this the 14 day of February, 2001

/s/ A. ANDREW MACQUEEN, III
The Honorable A. Andrew MacQueen, III

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27th DAY OF FEB. 2001.

/s/ Cathy S. Gatson, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:
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APPENDIX C

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States', in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the lower court properly instructed the jury that it could award damages for fear of cancer in a FELA case if it found that the plaintiffs had sustained asbestos related injuries and that the plaintiffs' fear of developing cancer as a result of their asbestos exposure was reasonable?

Whether joint and several liability applies in FELA cases when the trial court determines that the alleged negligence of multiple tortfeasors resulted in a single, indivisible injury such as occupational pneumoconiosis?

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STATEMENT OF THE CASE

A. Introduction

This litigation involves six retired railway workers who brought FELA (Federal Employers Liability Act) lawsuits for occupational pneumoconiosis against the Norfolk and Western Railway Company. These cases do not present a good vehicle for deciding the fear of cancer and apportionment of damages issues raised by the petitioner. Because of the general verdict forms used with the railroad's acquiescence, there is no way of determining how much, if any, of the damages were awarded for fear of cancer.

Only two of the five plaintiffs had non-railroad exposure to asbestos. Even in those cases, the railroad exposure was far from marginal. One of the plaintiffs with non-railroad exposure, Carl Butler, settled with a non-railroad employer, APCO (Appalachian Power Company), and the verdict against the petitioner was reduced by the amount of that settlement, as well as the amount of Mr. Butler's workers' compensation award. To have employed *both* a settlement offset and some other means of apportioning damages would have resulted in "double dipping." The injuries suffered, mixed dust pneumoconioses, were properly found by the trial judge to be indivisible, and incapable of rational apportionment on the basis of causation. Even if the lower court had abandoned the doctrine of joint and several liability for multiple tortfeasors whose negligence combine to cause an indivisible injury, there was no evidence presented to establish any fault on the part of the non-railroad employers for purposes of apportioning damages. Thus, these cases present a poor vehicle for deciding apportionment issues.

The conflicts of authority alleged by the railroad are more apparent than real. The cases cited in support of a "physical manifestation" requirement in emotional distress cases are factually distinguishable and almost all of them predate this Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) [Gottshall] and *Metro-North Commuter Railroad v. Buckley*, 525 U.S. 424 (1997) [Metro-North]. The cases cited for apportionment of damages do not involve multiple tortfeasors whose negligence was found by the trial court to cause an indivisible injury, which is the type of injury alleged here.

The holdings of the lower court were correct and consistent with similar rulings in many other jurisdictions. Furthermore, the petition exaggerates the impact of the trial court's rulings, and the importance of West Virginia as a forum for FELA cases, while unfairly accusing the Supreme Court of Appeals of West Virginia of engaging in "a pattern of injustice and maladministration" merely because it has declined to accept two petitions for appeal filed by the defendant.

B. Occupational Exposure

At trial, all of the plaintiffs testified about their exposure to asbestos and other toxic airborne contaminants, as well as their employer's failure to provide them with breathing protection or warn them about the hazards of exposure to airborne dust. Although the railroad asserts at page 8 of the petition that "Respondent John Shirley worked for N&W primarily as an office clerk with minimal or no exposure to asbestos," Mr. Shirley testified about significant exposure to asbestos, as well as exposure to traction sand and coal dust. He worked in buildings with asbestos-covered steam

pipes. Trial Transcript (4/17/98) at 18. The Inspector's Office had asbestos walls and ceilings and there were asbestos covered pipes in the washrooms. *Id.* at 19. As a laborer in the station house, he shifted merchandise among cars, handling sheets and rolls of asbestos. *Id.* He also moved large (50-100 lb.), dusty bags of asbestos, *id.* at 12, and swept up when bags and cans of asbestos broke open. *Id.* at 13-6. The railroad also minimizes Mr. Butler's exposure to asbestos, but he also testified about significant exposure to asbestos and coal dust. *See* Trial Transcript (4/16/98) at 9-14 (discussing his work around asbestos insulated steam locomotives that were being repaired, insulated steam pipes and coal dust from stoves and coal cars).

Two of the plaintiffs, Mr. Ayers and Mr. Butler, had some asbestos exposure at non-railroad jobs. The defendant argues that the damages awarded to these gentlemen should have been reduced to reflect these non-railroad exposures. This argument lacks merit for four reasons: First, all of the plaintiffs' asbestos exposures contributed to the development of their asbestos related disease and under FELA, the railroad is responsible if its negligence played even the slightest part in causing those injuries. Second, Mr. Butler's award was reduced by his workers' compensation and employer settlements. Third, the railroad did not seek to add any third party defendants to these lawsuits (such as the Ford dealership where Mr. Ayers worked for a time), or make any effort to obtain contribution from any third parties. Finally, there was no evidence presented by the railroad to show that the non-railroad employers were negligent.

C. Medical And Scientific Evidence

At trial, none of the treating doctors testified, although both sides relied on medical records from treating physicians and called various expert witnesses to the stand. Dominic Gaziano, M.D., a Board Certified Pulmonologist and NIOSH Certified B-Reader, Trial Transcript (4/16/98) at 27, 38-9, was called as an expert witness by the plaintiffs. He testified that each of the plaintiffs suffered from an occupational lung disease (either asbestosis or a mixed dust pneumoconiosis including asbestosis and silicosis) that had been caused, at least in part, by occupational exposure to asbestos and other toxic dusts on the railroad. *Id.* at 76, 100, 115, 125, 128, 135. In each case, the plaintiff's condition was permanent, likely to worsen in the future, *id.* at 79, 102-03, 116, 125, 129, 140, and had already resulted in a measurable impairment of pulmonary function. *Id.* at 78, 101-02, 117, 124, 128, 135. Furthermore, because of their occupational exposure to toxic dusts, and their present occupational lung diseases, the plaintiffs were at risk of developing lung cancer and mesothelioma, *id.* at 80-1, 86 111-12, 120, 125, 129, a painful, almost invariably fatal cancer of the pleural lining. *Id.* at 50-1. Because of this increased risk of developing malignancies, the plaintiffs needed to have yearly chest x-rays and regular (every two or three years) pulmonary function tests. *Id.* at 84-5, 112, 129. Dr. Gaziano's diagnoses of occupational lung disease were corroborated by medical records from treating physicians in the Butler, Ayers and Spangler cases. Trial Transcript (4/16/98) at 66, 90-91, 98-100. Even Dr. Renn, a medical expert retained by the defendant, agreed that all of the plaintiffs were at risk of developing mesothelioma because of their occupational exposure to asbestos. Trial Transcript (4/24/98) at 203, 208, 213, 216, 218, 221.

Arnold Brody, a prominent scientist who studies lung pathology, testified about his research concerning the effects of asbestos fibers on the lung. He opined, among other things, that smokers exposed to asbestos have a synergistic risk of developing lung cancer, which means that the risk of developing cancer is multiplicative, rather than simply additive. Trial Transcript (4/15/98) at 150. He also testified about two epidemiology studies which showed that asbestosis patients who smoked had a 10% mortality rate from mesothelioma, and a 39% mortality rate from lung cancer. *Id.* at 134, 135. Smokers who were not exposed to asbestos had a much lower risk of dying from cancer. *Id.* at 134-35.

Dr. Renn, the defendant's medical expert, also testified about cancer risks during his cross examination. He admitted that the studies by Berry and Courts showed a 9-10% mortality rate from mesothelioma among asbestotics, Trial Transcript (4/24/98) at 159, and that smoking does not increase the risk of developing mesothelioma. *Id.* at 159-60. He also discussed the synergistic relationship of smoking and asbestosis as it relates to the development of bronchogenic lung cancer, opining that asbestotics who did not smoke had a 2.5% risk of developing lung cancer, *id.* at 162, that smokers without asbestos exposure had a 10-15% risk of lung cancer, *id.* at 163, and asbestotics who smoked had a 39% risk of dying from lung cancer. *Id.* at 161. In other words, asbestotic populations had a much higher cancer risk than populations without asbestosis. *Id.*

Only two of the plaintiffs were current smokers. John Shirley, Jr. had never smoked, while Carl Butler quit in 1965, Trial Transcript (4/6/98) at 6; Doyle Johnson quit in 1987, Trial Transcript (4/17/98) at 7; and Clifford Vance quit

in 1985. Trial Transcript (4/15/98) at 67. Dr. Renn, the defendant's medical expert, admitted that Mr. Butler, despite his smoking history, had no lung impairment due to smoking. Trial Transcript (4/24/98) at 203. Dr. Gaziano, plaintiff's medical expert, testified that Mr. Vance had no measurable impairment from smoking. Trial Transcript (4/16/98) at 27. Dr. Renn also found no measurable impairment of lung function for Mr. Vance. Trial Transcript (4/22/98) at 169. All of the plaintiffs with a measurable lung impairment related to smoking received a significant reduction of their award for comparative negligence. *See* Johnson Judgment (14%), Ayers Judgment (31%) and Spangler Judgment (37%). Thus, petitioner's assertion at page 24 that "N&W is now solely responsible for massive damage awards to former employers . . . whose lung disorders are largely attributable to their own smoking habits" is completely unfounded.

D. Lay Testimony Concerning Physical And Emotional Injuries

Clifford Vance testified that he gets short of breath when he walks up a hill, walks "too fast", or when he tries to lift anything and stated he feels like he's "gonna fall dead." Trial Transcript (4/15/98) at 31. He can't do the same things he used to do with the grandchildren ten years ago. *Id.* at 33-4. He used to have a two acre yard that he took care of by himself, but he sold it and moved because he couldn't keep it up anymore. *Id.* at 33. Now, he has a very small yard, *id.* at 31, about 70'x80' that takes him 20 minutes to mow, and he has to rest if he tries to mow it all at one time. *Id.* at 32. His condition has changed a lot in the last five to eight years. *Id.*

Carl Butler testified that his breathing has gotten worse since 1991. Trial Transcript (4/16/98) at 16. Now, he can't work more than 10 or 15 minutes without having to sit down and rest. *Id.* at 17. Because of his physical condition, he has had to buy equipment to make his farm work easier. *Id.* For example, he bought a round bailer so he wouldn't have to put square bales on a truck. *Id.* at 17-8. He used to hunt, but now he can't get around the hills. *Id.* at 18. Moreover, he can't garden as well as he used to. *Id.* at 19. For the last two or three years, he has only been able to hoe half a row without resting. *Id.* at 19. He also has concerns about contracting cancer, especially since he watched his mother suffer with breast cancer, and he had a son who died from colon cancer. *Id.* at 20. It "scares" him to think he might have to go through that pain and suffering. *Id.* He is also concerned about who will take care of his farm if he falls sick. *Id.* If he carries a block of salt 50 yards, he has to stop three times. *Id.* at 16.

Freeman Ayers testified that he noticed some shortness of breath before 1991, and that it has been getting worse. Trial Transcript (4/17/98) at 25. Now, he can't mow the grass, climb a hill or walk more than a block and a half, without becoming short of breath. *Id.* In fact, he had to stop and rest walking from the hotel to the parking lot to get a ride to the courthouse. *Id.* at 26. Mr. Ayers used to fish, but he sold his 28' boat and most of his equipment because he no longer had the wind or strength to go fishing. *Id.* at 26-27. He knows he might develop cancer because of his occupational exposure to dust, and has tried to prepare for that possibility by paying off his Ranger. *Id.* at 27. Mrs. Ayers did not attend the trial because he did not want her to know about it. *Id.*

John Shirley, Jr. testified that he suffers from shortness of breath, Trial Transcript (4/17/ 98) at 32, and it is getting

worse. *Id.* at 37. He can't walk or talk very much, and he has a cane so he can stop and rest when he is walking. *Id.* at 32. He can't climb more than a few steps at a time, do housework or sing in the choir. *Id.* He used to travel and sing with a gospel group for 13 years, but the group broke up in the mid '80's when he couldn't sing anymore. *Id.* at 34. Although he is worried about cancer, *id.* at 38, he is even more concerned about his shortness of breath. *Id.* at 39. He is a "nervous wreck," *id.* at 37, and sometimes depressed. *Id.* at 38. He thinks about his family, and is trying to make preparations and have everything in order. *Id.* at 37.

Doyle Johnson testified that he suffers from shortness of breath; that he used to mow his lawn without stopping in 20 minutes, but now he has to stop and rest and it takes him an hour; that when he retired in 1987 he could walk twice the length of the Williamson, West Virginia, flood wall (2x2.5 miles), but now he becomes short of breath if he walks a block; that he used to help his wife with the housework, but now it "gets to him" if he runs the sweeper; that he believes he is at increased risk of developing cancer because of his exposure to asbestos, and it worries or concerns him. Trial Transcript (4/17/98) at 51-54.

James Spangler testified that he first noticed his shortness of breath in or about 1992; that it has been getting worse; and that he is worried about being on oxygen all the time or being a burden to his children. Trial Transcript (4/20/98) at 61, 66. He also testified that it takes him five or six minutes to get the mail from his mailbox, which is only 110 feet from his house. *Id.* at 64, 65. At that rate, it would take him 20 minutes to walk a quarter mile. *Id.* at 65. When he finally brings the mail in the house, he has to stop and rest, and he is breathing heavily. *Id.* at 66. Mr. Spangler also discussed

how he supervises maintenance work at his rental properties. His helper drives him as close to the door as possible and brings a chair for him to sit in as he directs the work. *Id.* at 61. Even so, he is sometimes winded just walking in the house and sitting down. *Id.* at 62. Mr. Spangler also walked for the jury so they could see how slowly he moved. *Id.* at 63.

E. Judgment

On January 6, 1999, after deducting offsets for settlements with various manufacturers of asbestos products and premise defendants and reducing some verdicts for smoking related comparative negligence, the court entered judgment orders in favor of all plaintiffs. Several months later, on September 17, 1999, the trial court further reduced the judgments in all of these cases to give the defendant railroad credit for some additional settlements.

On or about January 19, 1999, the defendant, Norfolk Southern Railway Company, successor in interest to the Norfolk & Western Railway Company, filed a motion for judgment as a matter of law or in the alternative, for new trial or remittitur. The lower court entered an order denying this motion on September 13, 2000. The lower court entered a second, identical order denying the railroad's motion on November 13, 2000. By order entered on February 27, 2001, the lower court vacated its first two orders and once again denied the defendant's motion for new trial or remittitur.

REASONS FOR DENYING THE WRIT

I. These Cases Provide A Poor Vehicle For Deciding The Issues Raised By Petitioner.

One of the issues raised by the railroad concerns the ability of the jury to award damages for fear of cancer. Because of the verdict forms used in these cases, there is no way to determine whether the jury actually made such an award. On each verdict form, the jury indicated that the negligence of the Norfolk and Western Railway Company had caused or contributed to a "lung injury or pulmonary impairment", a finding amply supported by the evidence. The verdict forms used in these cases do not indicate the amount of damages, if any, awarded for fear of cancer or other emotional distress. The only question pertaining to damages on these forms asked the jury: "What amount do you find will reasonably compensate the plaintiff [NAME], for the ~~loss he~~ has suffered and may suffer in the future because of his lung injury?" Under W. Va. R. Civ. P. 49, the jury could have been asked to award specific sums for each element of damages. The railroad, however, did not request a more detailed verdict form, or object to the treatment of damages on the form used. Given these general verdicts, it is impossible to tell what amount of damages, if any, was awarded for emotional distress in general, or fear of cancer in particular. Under state law, the defendant's failure to request a breakdown of damages is sufficient to preclude appellate review of its argument that certain damages should not have been awarded. *See Gerver v. Benavides*, 530 S.E.2d 701 (W. Va. 1999) (per curiam); Syllabus Point 7, *Miller v. Monongahela Power Co.*, 403 S.E.2d 400 (W. Va. 1991); *Grove v. Myers*, 382 S.E.2d 536, 542 (W. Va. 1989).

The railroad also complains that the damages were not apportioned among employers. The occupational pneumoconioses suffered by the plaintiffs, however, are classic examples of "indivisible" injuries which cannot be rationally apportioned on the basis of causation. Moreover, even if the lower court had abandoned the doctrine of joint and several liability, there would have been no evidence to apportion damages on the basis of fault. If petitioner's counsel believed that some ruling by the trial court prevented them from presenting such evidence, they needed to vouch the record to preserve the issue for appellate review. *Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991).

Only two of the five plaintiffs had asbestos exposure at non-railroad jobs, and even in those cases, the railroad exposure was not minimal as alleged by the railroad. One of the plaintiffs with non-railroad asbestos exposure, Carl Butler, settled with a non-railroad employer, APCO, and the trial court allowed an offset for that settlement as well as for Mr. Butler's workers' compensation award. To have employed *both* a settlement offset and apportionment would have improperly reduced the petitioner's liability. Once again, these cases present a poor vehicle for deciding the issue presented.

II. The Alleged Conflict Of Authority Concerning Damages For Emotional Distress Is Based On Factually Distinguishable Cases, Most Of Which Predate This Court's *Gottshall* and *Metro-North* Decisions

The railroad asserts that there is a split of authority in the lower courts as to whether or not damages for emotional distress can be awarded in FELA cases absent some form of manifestation, presumably either physical symptoms or a medical diagnosis. On the "manifestation" side, it cites five FELA cases, two Jones Act cases and a state law tort action. On the other side it cites the Second Circuit's decision reversed by this Court in *Metro-North*.

In one of the "manifestation" cases referred to by the railroad, *Haggerty v. L&W Marine Serv., Inc.*, 788 F.2d 315, 317-18 (5th Cir.), *reh'g en banc denied*, 797 F.2d 256 (5th Cir. 1986), the Court actually rejected "physical manifestation" of emotional distress as a prerequisite to recovery. In another case cited by the railroad, *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977), the plaintiff hurt his foot in a train collision, but the emotional distress he sought to recover for did not involve any fear of future illness or injury resulting from the accident. In *Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776 (Ohio 1995), where the plaintiff had been diagnosed with "severe depression", the railroad did not dispute that he had suffered emotional injury, and the court did not discuss what evidence was needed to establish emotional distress or opine that a psychiatric opinion was required.

None of the other FELA or Jones Act "manifestation" cases cited by the railroad involve a plaintiff who had suffered

a significant physical injury such as asbestosis. *See Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 477 (5th Cir. 2001) (sexual harassment case where plaintiff's counsel waived any claim of physical injury); *Moody v. Maine Central Railroad Co.*, 823 F.2d 693 (1st Cir. 1987) (railway employee failed to establish that employer's harassment caused his angina attacks and general fatigue); *Alabama Great Southern Railroad Co. v. Jackson*, 587 So. 2d 959 (Ala. 1991) (supervisors hiding in locomotive bathroom at 2 a.m. frightened train crewman); *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428 (D.C. 1994) (decided under D.C. rather than federal law) (uninjured plaintiff failed to show more than a minimal or negligible threat of harm, so he was never in the zone of danger) (court states in dicta that emotional distress must be "serious and verifiable" but does not explain what proof is required). Consequently, these cases tell us nothing about whether the issuing courts would require some "manifestation" of emotional distress in FELA cases where, as here, the plaintiffs *have* been physically injured.

Moreover, the cases cited by the petitioner tell us virtually nothing about how the lower courts are interpreting this Court's holdings in *Gottshall* and *Metro-North* because most of them predate one or both of those decisions. Three of the FELA cases and one of the Jones Act cases cited by the railroad in favor of a manifestation requirement predate *both Gottshall* and *Metro-North*, while the other two FELA cases predate only *Metro-North*. The only FELA or Jones Act case cited by the railroad which was decided *after* both *Gottshall* and *Metro-North* is *Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 474 (5th Cir. 2001) in which the plaintiff "did not [even] plead negligent infliction of emotional distress" as a cause of action. *Id.* at 477 n.2. Moreover, Martinez's counsel waived any claim of physical injury, either as an event

precipitating emotional distress or as a result of emotional distress. Consequently, the court acknowledged it did not have an opportunity to address the zone of danger rule adopted in *Gottshall*. *Id.*

III. The Alleged Conflict Of Authority Concerning Joint And Several Liability Is Not Based On Cases, Such As This One, Involving Multiple Tortfeasors And Indivisible Injuries

The railroad asserts that there is a split of authority concerning whether damages in FELA cases should be apportioned, with seven cases from six courts approving apportionment and four cases rejecting it. This alleged conflict is more apparent than real. None of the purportedly "pro-apportionment" cases cited by the railroad involve the joint and several liability of multiple tortfeasors whose negligence was held to result in a single, "indivisible" injury. Instead, they involve pre-existing conditions and/or separate and discrete injuries, apparently none of which were found to result in "indivisible" injuries. *See Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490 (10th Cir. 1997) (two separate railroad injuries to back and pre-existing conditions of degenerative changes of lumbar vertebrae and abnormal curvature of spine); *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (per curiam) (alleged aggravation of pre-existing MS by train derailment); *Akers v. Norfolk and Western Railway Co.*, 417 F.2d 632 (4th Cir. 1969) (upholding against railroad challenge a jury instruction stating that the railroad was not responsible for pre-existing conditions it neither caused nor aggravated); *Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (shoulder injury and back injury resulting from separate injuries on railroad); *Gustafson v. Burlington Northern Railroad Co.*,

561 N.W.2d 212 (Neb. 1997) (given general verdict for plaintiff, trial court did not commit reversible error in giving instruction on aggravation of pre-existing injury that failed to say that if the jury could not determine how much of the plaintiff's current condition was due to aggravation, it should award damages for the entire condition); *Dale v. B&O*, 552 A.2d 1037 (Pa. 1989) (disability resulting from lifelong asthma and occupational asbestosis) (court did not determine "whether the evidence permits apportioning damages, or whether apportionment would be mere speculation, and whether plaintiff or defendant has the burden of proving the proportion of damages allegedly caused by B&O . . ."),[1] *Brewer v. Denver & Rio Grande Western Railroad*, 31 P.3d 557 (Utah 2001) (plaintiff with carpal tunnel claim also had "diabetes, obesity, age and sedentary habits"). None of the "pro-apportionment" cases cited by the railroad even discuss the joint and several liability of multiple tortfeasors for indivisible injuries, let alone say they are abandoning this rule. The failure of the petitioner to cite a single case rejecting joint and several liability in multiple tortfeasor situations is striking.

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1. The current status of the *Dale v. B&O* holding is unclear because of a recent decision by an intermediate appellate court in Pennsylvania holding that Conrail was responsible for the entire amount of damages for the plaintiff's carpal tunnel syndrome, although the railroad presented evidence that other activities, such as push-ups, could have been a contributing factor. *McDermott v. Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

IV. Petitioner Exaggerates The Impact of the Lower Court's Ruling and the Importance of West Virginia As A Forum.

West Virginia Trial Court Rule 26.01 provides for a Mass Litigation Panel (MLP) similar to a federal MDL. In its petition, the railroad complains that all of the asbestos related FELA cases in West Virginia have been transferred to the Circuit Court of Kanawha County, West Virginia, for processing by the state MLP and that the trial judge in the cases at bar may be involved in trying FELA cases for the MLP. Consequently, it fears that the trial judge's rulings on apportionment and fear of cancer damages may be applied in other FELA cases in West Virginia. The railroad fails to mention, however, that it has filed a pending declaratory judgment action in federal court challenging the assignment of FELA cases to the MLP. *Norfolk Southern Railway Co. v. McGraw*, Civil Action No. 2:01 1238 (S.D. W. Va.). Moreover, even if the FELA cases remain subject to the jurisdiction of the MLP, Judge MacQueen will be subject to the supervision of both Judge Gaughan, the supervising judge for the MLP, and the State Supreme Court. *See State ex rel. Allman v. MacQueen*, 551 S.E.2d 369 (W. Va. 2001) (per curiam). In addition, the Chief Justice of the Supreme Court of Appeals of West Virginia is free to assign additional judges to try MLP cases, *id.* at 377, 378; Trial Court Rule 26.01(3), so there is no guarantee that Judge MacQueen will try any or all of the FELA cases.

In an effort to magnify the importance of the lower court's ruling, the railroad notes that there are no appeals of right in West Virginia.[2] The Supreme Court of Appeals, however, has

2. Although there is no appeal of right in civil cases, the Supreme Court of Appeals of West Virginia accepts a high percentage (Cont'd)

frequently resolved appeals and writs arising from FELA litigation and in many cases has ruled in favor of the railroad.[3] That Court has also reviewed asbestos litigation on many occasions,[4] including a FELA case involving mesothelioma, a cancer of the pleural lining caused by exposure to asbestos. *See Lamphere v. Consolidated Rail Corp.*, 557 S.E.2d 357 (W. Va. 2001).

(Cont'd)

of petitions for appeal. Under its original jurisdiction, the Court also rules on many issues raised by extraordinary writs such as mandamus and prohibition. In 2000, the most recent year for which statistics are available, the Court granted 51.6% of the 3,403 petitions for appeal and extraordinary writ it considered. 2000 Statistical Report, Supreme Court of Appeals of West Virginia. More specifically, it granted 28.5% of the 431 petitions for appeal it considered in civil cases. *Id.* To put these figures in perspective, "[o]n average, all state courts of last resort granted only 10 percent of discretionary petitions considered in 1999." *Id.*

3. *See, e.g., Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam) (upholding on appeal a lower court ruling that denied the plaintiff's motion for new trial); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) (upholding on appeal a summary judgment and directed verdict in favor of the railroad); *Norfolk and Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990) (writ of prohibition) (holding that doctrine of forum *non conveniens* applies in FELA cases).

4. *See, e.g., Marlin v. Bill Rich Const., Inc.*, 482 So. 2d 620 (W. Va. 1996); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); *In Re State Public Bldg. Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994); *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285 (W. Va. 1994); *State ex rel. CCR Ltd. v. MacQueen*, 441 S.E.2d 658 (W. Va. 1994); *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992); *State ex rel. H.K. Porter Co. v. White*, 386 S.E.2d 25 (W. Va. 1989).

The fact that the Supreme Court of Appeals of West Virginia has declined to accept two of the petitioner's cases for appeal hardly constitutes "a pattern of injustice and maladministration of an important statute in West Virginia," petition at 3, especially when both appeals suffered from the same procedural shortcomings, *i.e.*, a failure to ask for a special interrogatory pertaining to damages in the trial court and a failure to allege or present any evidence of negligence on the part of other employers in cases where apportionment was sought.

As noted below, the lower court's rulings on fear of cancer claims and joint and several liability are consistent with the position taken on those issues by numerous courts in other jurisdictions. Moreover, in choosing a venue in which to file suit, plaintiffs' counsel have many factors to consider in addition to how the forum court has ruled, or may rule, on those two particular issues. For example, counsel must consider how congested the court system is, what kind of jury may be empaneled, how convenient the forum will be to an often elderly or infirm client who finds it difficult to travel, how accessible witnesses will be, the procedural and evidentiary rules of the forum, and the possibility that the chosen forum may dismiss a non-resident's claim on forum *non conveniens* grounds. Indeed, West Virginia's courts have frequently dismissed FELA cases pursuant to such motions, as evidenced by respondents' lodging in *Norfolk & Western Railway Co. v. Dye*, 121 S. Ct. 2593 (2001) (mem.), which included 15 dismissal orders. In addition, many law firms based in West Virginia, including respondent's counsel, have frequently filed FELA cases in other states such as Virginia, Kentucky and Ohio, and many firms based in surrounding states have never filed a single FELA case in West Virginia.

The claims involved in this appeal certainly do not illustrate the problem alleged by petitioner because they do not involve non-resident plaintiffs seeking a more friendly forum than their home states. These six consolidated cases were tried in Charleston, West Virginia, and all of the plaintiffs had strong connections with the forum state. Freeman Ayers had lived in Princeton, West Virginia since 1940, Trial Transcript (4/17/98) at 5, and worked for the railroad in Princeton, West Virginia and Elmore, West Virginia. *Id.* at 7, 16. Carl Butler was born in Bluefield, West Virginia, Trial Transcript (4/16/98) at 5, and was living in Pipestem, West Virginia at the time of trial. *Id.* at 3. He worked for the railroad in Princeton, West Virginia. *Id.* at 8, 12. Doyle Johnson had spent most of his life in West Virginia. Trial Transcript (4/17/98) at 3-4. At the time of trial, he was living in Williamson, West Virginia. *Id.* at 3. For much of his railroad career, he was based in Williamson, West Virginia. John Shirley was a long time resident of West Virginia who worked for the railroad for 29 years in Bluefield, West Virginia. *Id.* at 6-7, 29. James Spangler was born in Wilcoe, West Virginia, and at the time of trial, had lived in Princeton, West Virginia, for 60 years. Trial Transcript (4/20/98) at 4. Much of his railroad career was spent in the Princeton/Bluefield, West Virginia area. *Id.* at 10, 26, 28, 29. Clifford Vance was born and went to school in Iaeger, West Virginia. Trial Transcript (4/15/98) at 5. At the time of trial, he was living in the area between Bluefield and Princeton, West Virginia. *Id.* He worked for the railroad in Iaeger, West Virginia and Bluefield, West Virginia. *Id.* at 9, 19, 23, 26.

In its petition, the railroad notes that there were approximately 2,500 asbestos-related railroad cases filed in West Virginia according to an administrative order filed by the Supreme Court of Appeals on December 28, 2000.

The petition does not indicate, however, how many of those 2,500 plaintiffs were West Virginia residents, nor how many of the non-resident plaintiffs had worked for the railroad in West Virginia. Nor does it give the reader any basis for comparing this figure to the asbestos-related caseload in other states. Because railroads have historically been a major employer in many West Virginia counties, it should come as no surprise that this state has a significant FELA caseload. In fact, the C&O, a predecessor to CSX, maintained what was widely acclaimed as the largest steam locomotive repair facility in the world at Huntington, West Virginia, a city named after a railroad magnate. The Norfolk and Western Railway Company and the Virginian Railway, predecessors in interest to today's Norfolk Southern Railway Company, also maintained track and facilities in a host of West Virginia communities, including Bluefield, Princeton, Iaeger, Logan and Williamson. Other railroads which have operated in West Virginia include the B&O, New York Central, Penn Central, Conrail and the Wheeling & Lake Erie Railway.

The railroad cites various mass filings of FELA claims in the Northern Panhandle of West Virginia by a law firm with offices in West Virginia and Pennsylvania. Although the railroad notes that many of these plaintiffs were non-residents, it does not indicate how many of the non-residents worked for the railroad in West Virginia at some point in time, or whether any forum *non conveniens* motions were filed. Without this information, the significance, if any, of the mass filings is at best unclear. Moreover, despite the railroad's complaints about the *in terrorem* effect of mass filings, there is nothing in the record to suggest that FELA settlements are any higher in West Virginia than in other states. In fact, the railroad asserts at page 3 that the "vast majority" of claims settle "for far less than the cost to the railroads of taking the cases to trial." Apparently, the *in terrorem* effect, if any, of mass filings is not very pronounced.

V. The Rulings Of The Lower Court Were Correct

A. Emotional Distress

Because all respondents suffered significant injuries from their occupational exposure to asbestos and, in some cases, silica, two widely recognized human lung carcinogens, the trial court properly instructed the jury that it could award damages for emotional distress, including fear of cancer. Its ruling was consistent with this Court's *Metro-North* decision, which held that a person exposed to a toxic substance such as asbestos cannot recover damages for fear of cancer unless and until he "manifests symptoms of a disease." 521 U.S. at 427. In this case, all respondents have been diagnosed with occupational pneumoconioses, thus meeting that requirement. This Court has never required a plaintiff who currently suffers from a compensable injury or illness to also establish a physical manifestation of his emotional distress, nor should it, although invited to do so in both *Gottshall* and *Metro-North*. In fact, in *Metro-North*, this Court recognized that "[c]ommon law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress . . .", 521 U.S. at 432, and that "[t]he law, . . . does permit recovery for emotional distress where that distress accompanies a physical injury, . . ." *Id.* at 429-30. It also distinguished *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (C.P. 1987), which allowed the recovery of damages for fear of cancer, as a case involving an "asbestos-afflicted plaintiff" who "fell within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437.

In its decisions concerning emotional distress damages in FELA cases, this Court has looked for guidance to the common law. Historically, plaintiffs who suffered a physical injury or illness have been allowed to recover damages for emotional distress related to their injuries or the conduct which caused them. *See* Restatement (Second) of Torts § 456 (1965) ("Emotional Disturbance Resulting From An Actionable Injury Or The Conduct Which Caused It").

Many state and local courts have allowed fear of cancer claims in cases involving asbestosis or asbestos related pleural disease without requiring any physical manifestation of emotional distress. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1362, 1367 (3d Cir. 1993); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-14 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, No. 85 C 10748, 1990 WL 93292 (N.D. Ill. June 19, 1990); *Mauro v. Owens Corning Fiberglas Corp.*, 542 A.3d 16 (N.J. Super. 1988); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 507 N.E.2d 476 (C.P. 1987); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 526-29 (Fla. Dist. Ct. App. 1985); *Denton v. Southern Railway Co.*, 845 S.W.2d 885, 888-89 (Tenn. Ct. App. 1993) (FELA).

Allowing railway employees who suffer from asbestosis or other occupational diseases to recover damages for a reasonable fear of developing cancer does not "open the floodgates," a concern expressed in this Court's earlier emotional distress cases. Accordingly, such claims are permitted under FELA in keeping with its remedial and humanitarian purposes.

B. Joint And Several Liability

Given the indivisible nature of the lung diseases of Respondents Ayers and Butler (the only cases arguably involving non-railroad exposure), the lower court did not err in applying joint and several liability, even though there may have been asbestos exposure at other job sites. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973) (asbestosis is an indivisible injury); Restatement (Second) of Torts § 433A, comment i (1965) (damages for most personal injuries cannot be apportioned), Trial transcript (4/16/98) at 147 (testimony by Dr. Gaziano that one has to consider the cumulative effect with dust diseases because all exposures contribute to the disease); Transcript (4/24/98) at 165-67 (testimony by Dr. Renn that fiber burden over entire career contributes to disease).

FELA provides that a carrier is responsible for any injury caused, in whole or in part, by its negligence. 45 U.S.C. § 51. FELA provides no grounds for diminishing that responsibility other than the contributory negligence, if any, of the employee. *See* 45 U.S.C. § 53. This statutory language is reinforced by the common law.

At common law, multiple tortfeasors whose negligence combined to cause a single, indivisible injury were jointly and severally liable for the plaintiff's loss. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); Restatement (Second) of Torts §§ 875, 879 (1977); Restatement of Torts §§ 875, 879 (1939); Dan B. Dobbs, *The Law Of Torts* § 390 at 1091 (2000). It was the function of the judge, rather than the jury, to determine whether an injury was divisible or indivisible. Restatement (Second) of Torts § 434 (1965). If a party believed that

apportionment of damages was appropriate, it had the burden of proving what portion of the damages it should be responsible for. Restatement (Second) of Torts § 433B(2) (1965).

When Congress enacted FELA, it did not abolish the common law doctrine of joint and several liability. Over the many years since FELA was passed, state and federal courts have frequently recognized that multiple tortfeasors who cause an indivisible injury are jointly and severally liable to the plaintiff.[5] Congress, which must have been aware of these decisions, has never seen fit to amend FELA to provide for some form of proportionate liability of joint tortfeasors. Given the delicate balance of statutory compensation schemes such as FELA, and the variety of apportionment mechanisms that might be substituted for traditional joint and several liability, any change to the apportionment rules under FELA should come from Congress, rather than the courts.[6]

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5. *See, e.g., Lockhard v. Missouri Pacific RR*, 894 F.2d 299, 305 (8th Cir. 1990); *Lewis v. Cimarron Valley Railroad*, 162 F. Supp. 2d 1220, 1227 (D. Kan. 2001); *Stephens v. Southern Pacific Transportation Co.*, 991 F. Supp. 618, 620 (S.D. Tex. 1998); *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F. Supp. 732, 735 (E.D. Ky. 1996); *Mazyck v. Long Island Railroad Co.*, 896 F. Supp. 1330, 1332-333 (E.D.N.Y. 1995); Syllabus Point 1, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383 (Kan. 1982); *Narcise v. Illinois Central Gulf Railroad Co.*, 427 So. 2d 1192, 1195 (La. 1983); *Lewis v. National Railroad Passenger Corp.*, 176 Misc. 2d 947, 675 N.Y.S.2d 504 (1998); *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993). *See generally* 46 CJS "Employers" Liability § 47 (1992).

6. In those states which have modified or abolished joint and several liability, the change has usually come through legislative (Cont'd)

Contrary to the railroad's assertions, joint and several liability is not an anachronism, but a widely applied doctrine of continuing vitality, not just here but abroad. It is applied not only in FELA cases but in Jones Act cases,[7] general maritime personal injury cases, *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), Longshoremen's and Harbor Workers' Compensation (LHWC) cases, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), Death on the High Seas Act (DOHSA) cases, *In Re Ocean Foods Boat Co.*, 692 F. Supp. 1253, 1264 (D. Ore. 1988), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cases,[8] and Federal Water Pollution

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(Cont'd)

enactment, rather than judicial decision. *See* Restatement (Third) of Torts: Apportionment of Torts § 17 at 153, 154, 156, 157, 159 (2000); Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Mem. St. U. L. Rev. 45, 82-3 (1992).

7. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430-32 (5th Cir. 1988); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987); *Dicola v. American Steamship Owners Mut. Protection & Indemn. Assn. (In Re Prudential Lines, Inc.)*, 170 B.R. 222, 235 (S.D.N.Y. 1995); *Johnson v. National Steel & Shipbuilding Co.*, 742 F. Supp. 1062, 1065 (S.D. Cal. 1990); *Texaco v. Addison*, 613 So. 2d 1193, 1202 (Miss. 1993).

8. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Ohm Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1579 (5th Cir. 1997); *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *Price v. U.S. Navy*, 39 F.3d 1011 (9th Cir. 1994); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); *O'Neill v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

Control Act (FWPCA) cases. *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982), *In Re Berkley Curtis Bay Co.*, 557 F. Supp. 335, 338-40 (S.D.N.Y. 1983). In addition, "joint and several liability with contribution has long been the rule in England and almost all other countries, most of which have comparative responsibility liability regimes." Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U. Cal. Davis L. Rev. 1141, 1185 (1988).

As recently as twenty-five years ago, joint and several liability was the rule in every state in the country. *Coats v. Penrod Drilling Corp.*, 61 F.3d at 1130-31. In the name of "tort reform," a number of states have since abandoned or modified traditional joint and several liability, but fifteen states (one more than the number of states using the zone of danger test when *Gottshall* was decided) still retain pure joint and several liability, while twenty other states retain it in a modified or limited form. Restatement (Third) of Torts: Apportionment of Liability § 17, reporter's note at 149 (2000). For example, some states apply joint and several liability when the plaintiff is free of negligence (under which approach respondents Vance, Shirley and Butler would be able to recover all of their damages from the railroad)[9] or apply joint and several liability only in certain kinds of cases.[10]

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9. GA. Code Ann. § 51-12-33; Mo. Ann. Stat. § 537.067; Okla. Stat. Tit. 23, § 13; Wash. Rev. Code Ann. § 4.22.070.

10. Significantly, some states have enacted legislation expressly retaining joint and several liability in cases involving toxic substances such as asbestos. *See* Haw. Rev. Stat. § 663-10.9(2)(c); *In Re Hawaii*

(Cont'd)

Regardless of what rules the state legislatures may choose to apply in tort cases, however, this court must be guided by the intent of Congress when it enacted FELA to shift the cost of industrial injuries and deaths to employers. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958). Abandoning the rule of joint and several liability in cases where the negligence of multiple tortfeasors results in an indivisible injury would be inconsistent with that goal. Under joint and several liability, the defendant bears the burden of locating and suing other potentially responsible tortfeasors and the risk that some or all of them may be dissolved, insolvent, immune from suit or simply not worth pursuing. Under the rule of several liability advocated by the petitioner, the injured party, even if wholly free of any contributory negligence, would bear those risks and burdens.

(Cont'd)

Federal Asbestos Cases, 960 F.2d 806, 818-19 (9th Cir. 1992); Ill. Comp. Stat. § 5/2-1118; *Padgett v. A&M Insulation Co.*, 640 N.E.2d 21, 23-4 (Ill. Ct. App. 1994); N.J. Stat. Ann. §§ 2A:115-5.3(d)(1) & (f); *Stevenson v. Keene Corp.*, 603 A.2d 521 (N.J. Super. Ct. 1992), *aff'd, per curiam*, 620 A.2d 1047 (N.J. 1993); Tex. Civ. Prac. & Rem. Code Ann. § 33.013(c)(2); *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989); Wash. Rev. Code § 4.22.070(3)(a); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989).

CONCLUSION

The Norfolk Southern's petition for certiorari should be denied.

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APPENDIX

APPENDIX — RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]

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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner Norfolk & Western Railway Company ("N&W") has demonstrated a mature split among the lower courts on two issues critical to the administration of the Federal Employers' Liability Act ("FELA"): the required elements for recovery of emotional distress damages, and the apportionment of damages. In their opposition, Respondents attempt principally to draw irrelevant factual and legal distinctions to suggest that this case is not the proper vehicle for resolving those conflicts of authority. Their arguments are unavailing.

1. Respondents devote much of their brief to a discussion of the evidence that is both misleading and irrelevant. First, they recount medical testimony that asbestotics have a higher cancer risk than the population at large. Opp. 4-6. But that is a diversion from the relevant and uncontroverted point that cancer is not medically linked to, or caused by, asbestosis, and thus fear-of-cancer damages cannot be awarded as pain-and-suffering for asbestosis. Pet. 12. Under the common law and FELA, plaintiffs may only be compensated for fear of cancer under an independent cause of action for negligent infliction of emotional distress, which requires *both* that the plaintiff is in the zone of danger (as may be evidenced by physical injury, *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997)), and that there be some objective manifestation of serious emotional injury. It is the latter that is at issue in this case. See *infra* at 4-6.

Second, Respondents recount in detail their testimony of pain and suffering. Opp. 6-9. But there is no dispute that Respondents may have a properly instructed jury determine pain and suffering from their asbestosis (such as shortness of breath), injuries which in these cases were relatively minor for plaintiffs of their circumstances and could not have accounted for million-dollar verdicts. The issue presented to this Court is the pure legal question of whether the jury can be *instructed*

that it can award damages for fear of cancer without a showing of both physical injury from asbestos exposure (the asbestosis) *and* physical or other objective manifestation of emotional injury. Respondents effectively concede that they made no showing of the latter.

Third, Respondents wrongly claim that review is precluded under West Virginia law because no special verdict form was used. Opp. 10. That is a misstatement of state law, even assuming state law can preclude this Court's review in FELA cases. The rule, under both federal and West Virginia law, is that an error in jury instructions requires reversal even if the jury rendered a general verdict. See *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury"); Syllabus by the Court at 960, *Hull* v. *Geary*, 76 S.E. 960 (W. Va. 1912) ("[a]n instruction recognizing two different measures of the damages when only one is applicable in the case, and plainly tending to mislead the jury, is error for which the trial court is justified in setting aside the verdict"). The state cases upon which Respondents rely (Opp. 10) are not to the contrary; they hold only that where the claim of legal error (exceeding a statutory cap or excessive prejudgment interest) depends on the *amount* of a specific kind of damages, relief will not be granted absent a special interrogatory in the verdict form. Respondents' objections to this Court's review are common in tort cases, and just as routinely rejected by this Court. See, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 351 (2000); Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at 8-9, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000).

Fourth, as to apportionment, Respondents assert that this is an improper vehicle because there was no evidence presented that Respondents' other employers (such as a power company and an auto dealership) acted negligently in exposing Respondents to asbestos, nor did the railroad attempt to join them as third parties. Opp. 3, 11. These arguments are based

on a misunderstanding of FELA and the issue presented to this Court. Petitioner challenges the jury instruction that in awarding damages against the railroad the jury was "'not to make a deduction for the contribution of nonrailroad exposure.'" Pet. 9. This was error because FELA provides that the rail carrier is liable only (1) for the plaintiff's "injury while he is employed by such carrier in [interstate] commerce" (2) that "result[s] in whole or in part from the negligence" of the rail carrier. 45 U.S.C. § 51. Apportionment under FELA accordingly involves two steps: (1) apportionment between railroad and nonrailroad injury, and (2) apportionment among the various tortfeasors who contributed to the railroad injury (such as the manufacturers of asbestos and asbestos-containing products to which the employee was exposed in his railroad work).

It is the first step of FELA apportionment that is the most critical in asbestos cases (and occupational-exposure cases generally), and it is the issue on which the court below is directly in conflict with the Supreme Courts of Utah and Pennsylvania. See *infra* at 6-7. Apportionment between railroad and nonrailroad injury does not require a showing that the nonrailroad causes were negligent or otherwise legally at fault, but simply that some part of the injury did not occur during railroad employment. That is the plain command of the statute, and if it were otherwise the railroad would become the lifetime insurer of any employee with even the most passing exposure to dangerous agents during his railroad work. Respondent Butler is a perfect example of the absurdity of the rule adopted by the court below: by proof of a mere *three months* of exposure to asbestos as a railroad employee, he is allowed by the court below to recover all his asbestos-related damages (including fear of cancer) from the railroad under FELA's reduced standards of causation, even though indubitably the principal cause of his injury was his 33 years as a union pipefitter where he was continuously exposed to asbestos at various sites. Pet. 8. Petitioner presented

substantial evidence of the nature and duration of nonrailroad exposure that would have permitted a properly instructed jury to apportion damages between railroad and nonrailroad injury.

The issues on which the lower courts are divided are thus cleanly presented by this case. The rulings below do violence to the text of FELA and result in substantial and costly injustice to railroads. This Court should grant certiorari to restore order and clarity to the law.

2. *Emotional distress*. There is a square conflict among the lower courts as to whether a plaintiff may recover for emotional distress in a FELA action absent some medical or physical manifestation of that distress. Pet. 11-19. Respondents wrongly allege that this split of authority is not relevant to the decision below simply based on the presence in this case of a significant "physical impact" or injury (namely, asbestosis). Opp. 12-14, 21-22. Their argument is based on a misunderstanding of the distinctions drawn in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and in the common law.

In *Gottshall*, the Court cordoned off negligent infliction of emotional injury as "apart from the tort law concepts of pain and suffering," the latter of which encompasses mental harms "'stemming *directly* from a physical injury or condition.'" *Id.* at 544 (emphasis added). The Court defined the separate tort of negligent infliction of emotional injury as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and *that is not directly brought about by a physical injury*, but that may manifest itself in physical symptoms." *Id.* (emphasis added). Consistent with this distinction, the zone-of-danger test adopted by this Court for emotional distress claims under FELA is not limited to physical impacts: it "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, *or* who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (emphasis added). There is no doubt that the common law

jurisdictions adopting the zone-of-danger test have long required physical or objective manifestation of the claimed emotional injury as a precondition for recovery. See *id.* at 549 n.11; Pet. 13-14. Respondents' assertion that the presence of a physical impact eliminates the manifestation requirement has no basis in law.[1]

Respondents fail to distinguish individual cases within the relevant conflict of authority over whether FELA incorporates the common-law manifestation requirement.[2] Opp. 12. Respondents also attempt to dilute the split of authority by asserting that most of the cases predate the Court's decisions in *Gottshall* and *Buckley*. However, the Court has left this particular question unaddressed. Pet. 14-16. In *Gottshall*, the Court acknowledged the two separate common law "limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." 512 U.S. at 546. In both *Gottshall* and *Buckley*, the Court addressed only the first limitation through

[1] Respondents claim that in many jurisdictions fear of cancer claims do not require any manifestation of emotional distress. Opp. 22. But the common-law rule remains decidedly the majority rule, and in any event many of the cited cases explicitly required some manifestation or objective corroboration of the plaintiff's fear of cancer. *See, e.g., Mauro* v. *Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 24 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 561 A.2d 257 (N.J. 1989); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 481 (Ohio Ct. Com. Pl. 1987).

[2] For example, Respondents allege that the Fifth Circuit rejected a manifestation requirement for emotional distress claims, Opp. 12, but ignore its later opinion noting that "a plaintiff may recover damages for *serious* mental distress." *Hagerty* v. *L & L Marine Servs., Inc.*, 797 F.2d 256, 256 (5th Cir. 1986) (emphasis added). Respondents distinguish the decision in *Bullard* v. *Central Vermont Railway*, 565 F.2d 193 (1st Cir. 1977), on the irrelevant grounds that the plaintiff there sought recovery for emotional distress other than fear of future injury. Opp. 12. Moreover, even though the court in *Vance* v. *Consolidated Rail Corp.*, 652 N.E.2d 776 (Ohio 1995), did not identify exactly "what evidence was needed to establish emotional distress," Opp. 12, it did require at least some "'medical evidence'" to support such a claim. 652 N.E.2d at 784.

its adoption and application of the "zone of danger" test. *Id.* at 554-56; 521 U.S. at 430. Without any direct treatment of the second limitation, it is irrelevant whether the split of authority arose before or after *Gottshall* and *Buckley*. The relevant conflict is as alive today as before these decisions.

Contrary to Respondents' assertions, this case is the perfect vehicle for addressing the question presented. It is difficult to conceive of a case in which a plaintiff could present any less evidence of emotional distress. The only relevant evidence was some Respondents' own testimony that they are "concern[ed] about," or "worr[y] about" contracting cancer sometime in the future; indeed, the other Respondents provided no testimony at all regarding cancer. Opp. 6-9. Respondents otherwise refer to medical testimony that "plaintiffs were at risk of developing lung cancer." *Id.* at 4. Again, this testimony does not establish that Respondents actually experienced emotional distress.

3. *Apportionment.* N&W demonstrated that there is a square conflict on the critical question of apportionment of damages under FELA. Pet. 19-24. The Court's resolution of this conflict is particularly warranted by the rapid changes in the common law in the past few decades on this very issue. See *Restatement (Third) of Torts: Apportionment of Liability* § 17 (2000). Respondents fail to refute this split of authority and common law trend or give any reason to delay review.

Respondents attempt to distinguish the principal cases in conflict with the ruling below by arguing that none involved multiple tortfeasors. Their argument misses the point. Because FELA limits the railroad's liability to injury occurring during railroad employment that is caused by the railroad's negligence, 45 U.S.C. § 51, it commands apportionment between railroad and nonrailroad injury. That is why Respondents simply cannot distinguish the principal decision with which the decision below is in conflict: *Dale* v. *Baltimore & Ohio Railroad*, 552 A.2d 1037 (Pa. 1989). First, *Dale*, like

this case, involved indivisible injuries related to asbestos exposure. Second, Petitioner seeks apportionment not just among multiple tortfeasors, but as in *Dale* among the railroad's conduct and independent, nonrailroad sources of lung disease. Third, the holding of *Dale* broadly and properly requires apportionment among the railroad and all other causes, regardless of whether those causes involve independent tortfeasors. *Id.* at 1041. The railroad cannot be held jointly and severally liable for injuries caused outside of railroad employment. Thus, *Dale* repudiated joint and several liability as inconsistent with the statutory scheme, in clear conflict with the decision below.[3]

Similarly, Respondents' effort to distinguish the Utah Supreme Court's recent decision in *Brewer* v. *Denver & Rio Grande Western Railroad*, 31 P.3d 557 (Utah 2001), is unavailing. Opp. 15. As in *Dale*, the court affirmed the apportionment of damages among the railroad's negligence and other causes, including the plaintiff's "'diabetes, obesity, age, and sedentary habits.'" 31 P.3d at 571 n.7. Contrary to Respondents' assertions, these "natural conditions" have no bearing on the indivisibility of the injury itself. *Id.* The court mentioned these conditions only in the context of a state comparative negligence statute, which it expressly overrode in favor of apportioning damages under federal common-law principles governing FELA actions. *Id.* In addition, all but three of the federal appellate decisions have rejected joint-and-several liability for indivisible injuries from multiple causes, and are indistinguishable on the grounds which Respondents invoke. See Pet. 21-22.

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[3] Respondents make the implausible claim that a decision of a lower Pennsylvania court has called into doubt the validity of *Dale*. Opp. 15 n.1. To the contrary, the lower court relied on its prior decision in *Dale*, unaware that it had been vacated by the Pennsylvania Supreme Court. *See McDermott* v. *Consolidated Rail Corp.*, No. 153 EAL 2001, 2001 WL 1635493 (Pa. Dec. 20, 2001) (per curiam), *vacating* 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

Respondents also argue that N&W failed to join any third-party defendants, or to make any effort to obtain contribution from any third parties. Opp. 3. Under West Virginia law, however, N&W was barred from seeking contribution from any of the *32* other entities with which Respondents settled claims for the same injuries.[4] See *Board of Educ.* v. *Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 803-05 (W. Va. 1990). In any event, contribution actions are not necessary – and indeed, duplicative – under prevailing common-law principles where damages are apportioned among tortfeasors. See *Restatement (Third) of Torts: Apportionment of Liability* § B19 cmt. c.[5]

Most of Respondents' arguments in favor of joint-and-several liability, although erroneous, are relevant only at the merits stage. The critical point is that Respondents, admitting that only "fifteen states . . . still retain pure joint and several liability," Opp. 26, do not contest that the recent prevailing and rapid trend in the common law has been away from joint and several liability, even for indivisible injuries. Pet. 23; see also *Restatement (Third) of Torts: Apportionment of Liability* § 17 cmt. a; *id.* § D18 cmt. b.[6] Contrary to Respondents' claims, Opp. 24, this Court does not usurp Congress's role by fulfilling its statutory "duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958).

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[4] *See* Motions for Entry of Judgment Order (Petitioner's Lodging).

[5] Contrary to Respondents' claims, Opp. 11, the offset by the court below based on settlements with other entities (which amounted to less than 3% of the jury award) does not affect Petitioner's right to proper apportionment. *Cf.* Final Judgment Orders (Respondents' Lodging).

[6] Indeed, the Restatement sections cited by Respondents in favor of joint and several liability for indivisible injuries have been expressly superseded. *See Restatement (Third) of Torts: Apportionment of Liability* Parallel Table 2 (2000) (noting replacement of *Restatement (Second) of Torts* §§ 433A, 434, 879 (1965)).

This case thus presents a clear vehicle for resolving the conflict among the lower courts. In light of the rapid, definitive movement away from joint-and-several liability in the past few decades, the Court should establish a uniform standard for the apportionment of damages in FELA actions.

4. *FELA Mass Tort Litigation In West Virginia.* In their opposition, Respondents paint an idyllic picture of the conduct of mass tort litigation in West Virginia and elsewhere. Their assertions, however, reveal the exact opposite: the tactical targeting of pro-plaintiff jurisdictions to take full advantage of extraordinary rulings such as the decision below. It is no accident that 25,000 asbestos suits have been filed in West Virginia, and 2,500 FELA asbestos suits are pending against railroads, Pet. 25, even though only 1.6% of U.S. railroad employees reside in West Virginia, see AAR Br. 3. The need for uniform FELA standards on these questions could not be more apparent, and denial of certiorari would simply vindicate the strategy of the plaintiff's bar.

Respondents attempt to downplay the impact of the decision below on current and future FELA asbestos litigation. Despite acknowledging that all such litigation in West Virginia has been transferred to the court below, Respondents assume that Judge MacQueen "will be subject to the supervision of both . . . the supervising judge for the [Mass Litigation Panel], and the State Supreme Court." Opp. 16. Any effective oversight is doubtful, however, as the West Virginia Supreme Court has found Judge MacQueen to be "uniquely qualified" to conduct mass trials, *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 375 (W. Va. 2001), and has refused even to review such extraordinary rulings as his decision below.[7]

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[7] Respondents also exaggerate the availability of appellate review in West Virginia. There is no right of appellate review there, Opp. 16 n.2, and discretionary review is granted in less than 30% of civil cases, *id.* at 17 n.2. The vast majority of FELA and asbestos cases cited by Respondents were appeals raised by plaintiffs, not defendant railroads, or cases in which the court's jurisdiction was original. *Id.* at 17 nn.3, 4.

Respondents also claim that West Virginia courts do not suffer from an influx of non-resident FELA plaintiffs. Opp. 18-19. However, both Petitioner and the Association of American Railroads have presented numerous examples of mass FELA complaints filed in West Virginia by an astonishing number of out-of-state plaintiffs. See Pet. 25-26; AAR Br. 9 n.15. Contrary to Respondents' assertions, Opp. 18, the West Virginia courts have not contained this flood of litigation by dismissing cases on the grounds of *forum non conveniens*. Respondents rely solely on their lodging of 15 such dismissals in the past ten years. *Id.* This lodging at most illustrates that the West Virginia courts sporadically dismiss FELA cases on this basis, but more importantly reveals how broad is the practice of targeting pro-plaintiff jurisdictions such as West Virginia for the filing of FELA cases on behalf of thousands of non-resident plaintiffs. Pet. 25-26.

Now that all state-wide asbestos litigation has been transferred to a court that has ruled that multimillion dollar judgments are proper for any plaintiff with asbestos-related symptoms without a showing of any severe emotional injury and denied apportionment despite evidence of numerous other causes of injury, there can be no doubt that the West Virginia courts will be the principal locus for FELA litigation against the major Eastern railroads. With an even deeper conflict of authority and more serious practical consequences since *Dye*, the Court should review these two issues of fundamental importance to the equitable administration of FELA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§ 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. With the goal of providing a progressive and meaningful remedy, Congress lowered the then-existing common law barriers to recovery by abrogating the defenses of assumption of risk, the fellow servant doctrine and contributory negligence.[2] However, where Congress did

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[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

[2] The defense of contributory negligence is eliminated in favor of comparative negligence by 45 U.S.C. § 53; the assumption of the risk defense by 45 U.S.C. § 54. *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

not specifically alter the common law, the employee's remedy was to be consistent with common law principles.[3]

Subsequent to FELA's enactment, every state has enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact,[4] and each year thousands of claims and lawsuits, are asserted under FELA against AAR member railroads.[5]

This case, in which the plaintiffs alleged exposure to asbestos while employed at the defendant railroad, raises two issues that are of great interest to railroads. The trial court permitted the plaintiffs to argue to the jury that they were entitled to compensation for emotional distress resulting from their fear of contracting cancer in the future despite offering no evidence of any physical or emotional manifestation of their "fear." [*See* Petition at 8-9] In addition, the court instructed the jury to hold the railroad liable not only for any asbestos-related damages caused by the railroad's negligence, but also for *all* such damages, notwithstanding evidence that much of it was attributable to nonrailroad exposure. [*See* Petition at 2] Instructed to compensate plaintiffs for their fear

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[3] *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997); *See* infra p. 16.

[4] Under the Jones Act, which incorporates the substance of FELA by virtue of 46 U.S.C. § 688, seamen are covered by a fault-based compensation system. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[5] From 1996 through 2000, over 32,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

of cancer and to make no deduction for any contribution to plaintiffs' injuries caused by nonrailroad exposure, the jury made an award averaging nearly $1 million for each plaintiff.

The evidentiary requirements for emotional distress claims and the right to apportionment under FELA are issues brought into sharp focus by the rulings below. First, the court rejected petitioner's motion to exclude evidence related to cancer despite the presence of no evidence of any physical or other objective manifestation of an emotional injury. [*See* Petition at 9] Second, inasmuch that with respect to some plaintiffs there was evidence of significant exposure to asbestos at other jobs, and in some cases little evidence of exposure at the railroad [*See* Petition at 8], the court's jury instructions left the railroad exposed to damages for harm it did not cause.

The decision below is of great alarm to the nation's railroads because it encourages and facilitates a torrent of emotional distress claims, and makes railroads insurers of their employees' safety not only while working at the railroad, but also while employed elsewhere. Both issues on which petitioner seeks review arise with regularity in FELA litigation. Moreover, because West Virginia has become a magnet for FELA asbestos litigation, attracting to its courts numerous out of state plaintiffs, these rulings take on far more significance than would be expected given the state being home to only 1.6% of rail workers.[6] Adding to the mix the uncapped liability railroads face in each and every case, the decision below foretells serious financial consequences for the nation's railroads, making this case of utmost interest to AAR and its members.[7]

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[6] Association of American Railroads, *Railroad Facts* 58 (2001 ed.).

[7] FELA damages, unlike under workers' compensation, are uncapped. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132,

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the petition.

SUMMARY OF THE ARGUMENT

The decision by the court below, which pushes railroad liability beyond FELA's intent, presents squarely for review two important issues arising under FELA. The first is whether FELA courts should follow the majority rule by requiring that claims for damages for negligent infliction of emotional distress be supported by evidence of physical manifestation or other objective corroboration of emotional injury. Because FELA suits alleging exposure to asbestos are common—and often include allegations that the plaintiff suffers from emotional distress due to fear of cancer—this issue will continue to confront lower courts.

The other issue arises from the court's instruction which disregarded the principle of apportionment of damages in the face of evidence that some of the plaintiffs had significant exposure to asbestos at non-railroad jobs. That ruling fails to follow this Court's teachings on FELA jurisprudence, and misreads earlier decisions of this Court. Beyond the serious consequence on the petitioner (a total verdict of nearly $5.8 million), this issue is important because it is not uncommon for railroad employees to seek compensation under FELA where there is evidence that causes independent of the railroad employer's conduct are responsible for the employee's disabling condition. Given the open-ended nature of damage awards under FELA, a ruling which makes railroads responsible for non-work-related health conditions has serious consequences for the entire railroad industry.

The West Virginia Supreme Court declined to consider these two important issues. However, despite coming from a

137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

state trial court, this Court should review this case because, as a by-product of FELA's broad jurisdictional provision, plaintiffs can take advantage of liability-expanding decisions in a handful of jurisdictions by bringing large numbers of out-of-state cases in those courts. The case below, coming out of West Virginia, is a stark example of this phenomenon.

ARGUMENT

I. THE ERRONEOUS RULING ON THE FEAR OF CANCER CLAIM WILL HAVE A FAR REACHING IMPACT ON THE RAILROAD INDUSTRY

For the second time within a year, a West Virginia court has permitted a group of FELA plaintiffs who neither have cancer, nor any physical or emotional symptoms related to cancer, to seek substantial damages related to cancer.[8] Again, the one-tiered state appellate system afforded no forum for review of a ruling which surely will encourage additional "non existent" cancer claims. The ruling by the court below is out of step with a growing body of case law in other jurisdictions, and flies in the face of the principle enunciated by this Court calling for "substantial limitations" on emotional injury claims in order to avoid the potential for "nearly infinite and unpredictable liability." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994) This repeat performance erases any doubt that the petition puts before this Court a significant issue arising under FELA which, if unreviewed, has the potential to impact FELA cases arising over a vast geographic area.

[8] Last year, AAR filed an *amicus* brief urging this Court to grant *certiorari* in a case raising the same issues as the case at bar. *Norfolk & Western Ry. v. Dye*, 121 S.Ct. 2593 (2001)

A. FELA Suits Alleging Emotional Distress Stemming From Exposure To Asbestos Are Commonplace And Frequently Are Funneled Into A Few Selected Jurisdictions

The significance of this case is heightened by the fact that occupational exposure claims constitute an increasingly important aspect of litigation under FELA.[9] Substantial numbers of employees and former employees of railroads continue to file FELA lawsuits alleging occupational exposure to asbestos, with the plaintiff often seeking compensation for, among other things, negligent infliction of emotional distress, claiming a fear of contracting cancer at a future time.[10] In many cases, as in the case below, the plaintiff's sole evidence of emotional distress is nothing beyond his or her bare testimony about fear or concern of contracting cancer.

The issue of what kind of evidence is needed to sustain a claim for emotional distress goes beyond just asbestos litigation. It is not uncommon for FELA plaintiffs to claim that exposure to other allegedly harmful substances in the workplace has caused an FELA "injury." *E.g.*, *Baker v.*

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[9] Though FELA was enacted primarily to provide compensation to railroad employees for the physical perils of the job, *Gottshall* at 542, injuries caused by occupational exposure to harmful substances also are compensable. *Urie v. Thompson*, 337 U.S. 163 (1949)(exposure to silica dust compensable).

[10] From 1996 through 2000, over 7,500 FELA suits alleging occupational exposure to asbestos were filed against railroads. Asbestos suits accounted for about 23.7 percent of all FELA suits filed during that five-year period, and an incredible 45.2 percent of all FELA suits filed in 2000. Data compiled from AAR surveys of railroads. *See supra* note 5. While claims alleging emotional distress might arise in various contexts, *e.g.*, in *Gottshall*, the plaintiff alleged distress arising from having witnessed the death of a coworker, such claims tend to arise most frequently in exposure cases.

Norfolk & Western Ry., 514 S.E.2d 448 (Ga. App. 1999)(exposure to diesel exhaust allegedly caused cancer); *Savage v. Union Pac. R.R.*, 67 F.Supp.2d 1021 (E.D. Ark. 1999)(plaintiff alleged exposure to "large amounts of toxic substances."); *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F.Supp. 1119 (N.D. Ill. 1995)(plaintiff alleged exposure to herbicides caused his reactive airway dysfunction syndrome). Whenever there is an allegation that the plaintiff has been exposed to a substance that has been linked to cancer there is a potential claim for damages for emotional distress due to fear of cancer. Thus, the issue raised by the petition is one which can be injected into numerous FELA lawsuits.[11]

Regardless of their merit, the impact of expansive state court rulings, like the one below, is magnified by a confluence of factors which are inherent to FELA litigation. Taken together, these factors allow plaintiffs, after assessing the key issues in their case, to select a jurisdiction perceived as favorably disposed to their claim, a practice that has been elevated to an art in West Virginia.

Patent forum shopping is facilitated by the broad venue provision of FELA, under which railroads are subject to the jurisdiction of the courts in any district in which the railroad does business. 45 U.S.C. § 56.[12] As a result, a large number

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[11] On May 18, 2001, a complaint was filed against CSX Transportation on behalf of a "class" of "several hundred to several thousand workers" alleging exposure to "hazardous organic solvents" claimed to increase the risk of cancer. *Rice et al. v. CSX Transp., Inc.*, (Circuit Court of Marshall Cty., W. Va., filed May 18, 2001)(a copy of this complaint was lodged with the Court by *Amicus* in *Dye*).

[12] By the nature of their operations, the large railroads today do business in numerous states: Burlington Northern Santa Fe operates in 28 states; Union Pacific, Norfolk Southern and CSX each operate in 24 states. *See* Class I Railroad Annual Report to the Surface Transportation Board (Form R-1), submitted by each of these railroads pursuant to federal law.

of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[13] Moreover, even though FELA is a federal statute, plaintiffs can ensure that their suits will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. §1445(a).

Not only does the combination of FELA's broad venue provision and prohibition on removal allow plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum, as *forum non conveniens* motions typically are unavailing. [*See* Petition at 3] For example, to keep FELA cases in St. Louis, a jurisdiction perceived to be favorable for plaintiffs, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[14]

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[13] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991).

[14] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana) ; *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In each case, the railroad's *forum non conveniens* motion was denied in March 2001, with the plaintiff's receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders were lodged with the Court by *Amicus* in *Dye*.)

Consequently, a ruling by a single state court on an important issue arising under FELA can have far reaching effects. By channeling litigation into selected courts, plaintiffs can, and often do, take advantage of favorable rulings regardless of whether they reside, have worked, or claim to have been injured in the forum state. As a result, large railroads find a substantial portion of certain types of FELA claims being brought in a few select jurisdictions among the numerous states in which they operate, at levels far out of proportion with the number of its employees who live or work in that jurisdiction. While West Virginia is a favored jurisdiction for suing the major Eastern railroads, the plaintiff's bar also targets Mississippi, where venue can be established against a number of railroads. A notorious example of this rampant forum-shopping occurred in September, 2000, when a complaint was filed against a number of railroads in Jones County, Mississippi by 990 plaintiffs alleging "exposure to asbestos and other hazardous substances." *Foster, et al. v. Kansas City Southern Ry. Co., et al.* (Civil Action No. 2000-141-CV9, Second Judicial District of the Circuit Court of Jones County, Mississippi)(a copy of which was lodged with the Court by *Amicus* in *Dye*). Only about a quarter of the plaintiffs are Mississippi residents. Just as in the case below, the plaintiffs demand compensatory damages for "emotional upset, mental anguish . . . fear of cancer."

As demonstrated starkly by the petition, West Virginia is a favored jurisdiction for FELA asbestos litigation: there are several thousand asbestos-related FELA suits pending against railroads in West Virginia, many of which have been filed by plaintiffs who do not reside in the state. [*See* Petition at 25-26; Petitioner's Lodging in *Dye*].[15] Left undisturbed, the

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[15] Bringing cases from far and wide into West Virginia is nothing new. *See Norfolk & Western Ry. v. Tsapis*, 400 S.E. 2d 239, 241 (W. Va. 1990)(921 FELA lawsuits brought in Brooke County, of which 704

West Virginia ruling will govern not just a relatively few cases which may have a direct connection to the state, but also a substantial number of claims imported from all over the eastern half of the United States. Moreover, it is clear that the situation in West Virginia can easily be repeated in a few other select jurisdictions, giving a small number of state courts a disproportionate role in shaping federal law governing FELA litigation throughout the nation.

B. This Case Presents An Excellent Opportunity For This Court To Address An Important Issue Left Unresolved In *Gottshall* And *Buckley*.

The evidentiary issue in emotional distress claims raised by the petition was left unaddressed by this Court in its recent FELA decisions, yet it proves crucial in many FELA cases. In exposure cases the emotional distress claim often is the key to a large recovery, as the plaintiff frequently cannot produce evidence of any other significant damages: many plaintiffs are retirees who can make no claim for lost wages; in other cases, the plaintiff offers little evidence of a disability or impairment due to the alleged injury. Because the issue is raised squarely in this case, it provides an excellent opportunity for this Court to provide guidance and assure uniform application of FELA nationwide. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952).[16]

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involved non-West Virginia resident plaintiffs). Only six of the eighteen named plaintiffs in the *Rice* complaint, *see supra* note 11, reside in West Virginia; the others reside in Maryland, Kentucky and Georgia.

[16] The petition demonstrates that the question of the type of evidence necessary to sustain recovery for emotional distress under FELA is subject to a split among the lower courts, though the weight of authority is contrary to the ruling below. [Petition at part I.B.]. For example, recent opinions of federal courts in Georgia have recognized, contrary to the court below, that the relevant holdings of this Court call for a limiting rule on emotional distress claims. The Georgia court adopted "the rule that

Perhaps because FELA was enacted primarily to address the physical perils of railroad work, it was not until nearly 80 years after the statute was enacted that this Court first addressed the question of whether FELA permits a cause of action for negligent infliction of emotional distress. However, the past fifteen years has seen development of FELA jurisprudence on emotional distress claims, in concert with the growing number of cases raising such claims. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court held that a FELA claim for emotional distress was not precluded simply because the plaintiff also might have had the right to arbitrate the dispute under the Railway Labor Act, but, believing the record was insufficiently developed, this Court did not rule definitively on whether such a cause of action exists. 480 U.S. at 564.[17]

In *Gottshall*, this Court answered *Buell*'s unanswered question in the affirmative, while making it clear that such a cause of action is limited to specific circumstances. Noting that "[n]o jurisdiction . . . allows recovery for all emotional harms, no matter how intangible or trivial . . ." and that "significant limitations, taking the form of 'tests' or 'rules' are placed by the common law on the right to recover for negligently inflicted emotional distress . . ." 512 U.S. at 545, this Court held that the most appropriate test for determining

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applies in the vast majority of American jurisdictions: recovery for a claim of negligent infliction of emotional distress requires a plaintiff, in addition to showing impact under *Buckley*, to make a further showing of objective manifestation of that distress." *Dean, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2000) (twelve plaintiffs) (unpublished opinion); *Heirs, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2001) (six plaintiffs) (unpublished opinion) (copies of these decisions were lodged with the Court by *Amicus* in *Dye*).

[17] In *Buell*, the Court did suggest that even if it were to recognize a cause of action for negligent infliction of emotional distress, such a claim would likely be rare. 480 U.S. at 566, n.13.

the availability of a FELA remedy for negligent infliction of emotional distress was the common law "zone of danger" test. 512 U.S. at 554.

Three years after deciding *Gottshall*, this Court addressed a FELA claim for emotional distress arising not from a discrete accident, but rather, from long term exposure to asbestos which, according to the plaintiff, resulted in fear of a future consequence that might occur. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997). In *Buckley*, closing the door on a potential large number of FELA claims for negligent infliction of emotional distress, this Court reiterated that negligent infliction of emotional distress claims are permitted only when an exception to the general rule of nonrecovery is present: "the common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within certain specific categories that amount to recovery-permitting exceptions." 521 U.S. at 429. (emphasis in the original). The Court held that there could be no recovery for the plaintiff, who had been exposed to asbestos but manifested no disease, since the exposure did not satisfy the "physical impact" requirement of the zone of danger test. *Id.* at 430. This case differs from *Buckley* in that the plaintiffs here claim to have contracted a disease (asbestosis), which they assert entitles them to seek damages for emotional distress, albeit distress related to a different disease (cancer) from the one they allegedly have.

While the holding was limited to plaintiffs alleging exposure but manifesting no symptoms of disease caused by the exposure, the majority opinion in *Buckley*, as well as Justice Ginsburg's concurring and dissenting opinion, highlighted some of the inherent problems courts inevitably face in dealing with claims of emotional distress, suggesting that *Buckley* was not the last word on the issue. The Court pointed out that the question at issue was "the existence and seriousness of [the plaintiff's] claimed emotional distress."

521 U.S. at 433-34. After noting that "contacts . . . with serious carcinogens are common", *id.* at 434, the majority opinion summarized the problem:

> But how can one determine from the external circumstances of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated–particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? *The evaluation problem seems a serious one.* (emphasis supplied)

Id. at 435.

While Justice Ginsburg would not have limited recovery for emotional distress to employees within the zone of danger, *Gottshall*, 512 U.S. at 559 (Ginsburg, J., dissenting), her opinions in *Gottshall* and *Buckley* also recognize the importance of the issue raised by the case below. Justice Ginsburg concluded that the *Buckley* plaintiff was not entitled to damages for his alleged emotional injury because he "did not present objective evidence of severe emotional distress . . . . he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health." *Buckley*, 521 U.S. at 445.[18] Justice Breyer's majority opinion in *Buckley*, describing the evidentiary problems that inevitably arise in the context of emotional distress claims, underscored the consistency between the majority opinion

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[18] In contrast, Justice Ginsburg noted that in *Gottshall* "[b]oth workers suffered severe injury on the job, . . . Both experienced not just emotional, but physical distress [weight loss, insomnia, cold sweats, fatigue, headaches and sleepwalking] . . . both [plaintiffs] satisfy the 'physical manifestation' test endorsed by the Restatement of Torts." 512 U.S. at 568-69 (Ginsburg, J., dissenting).

and Justice Ginsburg's concurrence in assessing these problems: "And Justice Ginsburg, too, . . . would limit recovery in emotional injury cases to those who can show more objective evidence than *simply having expressed fear and concern* to supervisors." 521 U.S. at 434. (emphasis supplied)

Though, as Justice Breyer observed, the statistical link between exposure and future cancer risk may be "controversial and uncertain," it is certain that permitting evidence on cancer in every lawsuit where the plaintiff alleges asbestosis will inject a highly emotional and prejudicial subject into numerous cases and likely greatly inflate awards, based on that evidence, for many plaintiffs who never will develop cancer.[19] The highly prejudicial nature of cancer-related evidence is well recognized, and has caused many courts to exhibit great reluctance to allowing such evidence to be presented to a jury. In *O'Banion v. Owens Corning Fiberglass Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992), the court upheld the trial court's order "exclud[ing] evidence relevant to the plaintiffs' claim for damages due to increased risk of cancer or fear of cancer" because of the highly prejudicial nature of such evidence. Similarly, in *Jackson v. Johns-Manville*, 750 F.2d 1314, 1321 (5th Cir. 1985), the court agreed with the defendants that evidence of cancer should not be admitted to show liability in an asbestosis case "because the dire symptoms and consequences of the disease are so well known and feared by the general public that extensive evidence on the matter was likely to cause individual members of the jury to act out of unfair prejudice." This case presents the Court with an excellent opportunity to provide guidance that will permit appropriate compensation for plaintiffs who truly suffer

[19] As petitioner points out, the fact that the plaintiffs may have asbestosis does not increase the likelihood that they will contract cancer. *See* Petition at 7.

serious damages, while maintaining fairness and balance in FELA litigation.

II. BY REFUSING TO GIVE AN APPORTIONMENT INSTRUCTION THE COURT BELOW MISINTERPRETED FELA AND EXPANDED RAILROAD LIABILITY WELL BEYOND THE STATUTE'S INTENT

This case raises a second critical, unresolved issue common under FELA. Again departing from the prevailing common law rule, the court below refused to recognize that in a FELA case, when there is evidence that causes other than the railroad's conduct contributed to the plaintiff's injury, the railroad should be liable for only the portion of the damages caused by its conduct. The growing number of FELA claims alleging occupational exposure to a harmful substance or condition has elevated the importance of the apportionment issue because often the conditions allegedly caused by exposures at the workplace also may be caused by either non-occupational factors, non-railroad exposures, or both.[20]

A. The Court Below Ignored the Fundamental Common Law Principle That A Defendant Is Liable Only For The Harm It Caused

In *Gottshall*, this Court issued a reminder of a long-standing tenet of FELA: that railroads are not "insurers of the safety of [their] employees." 512 U.S. at 543; *See also Inman*

[20] This represents at least the third time that a West Virginia court has refused to recognize the right of apportionment in a FELA asbestos case where the evidence strongly suggested that non-railroad related factors were responsible for at least part of the employees' damages. *Dye*; *CSX Transp., Inc. v. Sirbaugh*, unpublished order, *cert. denied*, 520 U.S. 1139 (1997). No doubt, one of the benefits to plaintiffs of filing so many cases in West Virginia is the strong likelihood of avoiding submission of the issue of apportionment to the jury.

v. Baltimore & Ohio R.R., 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947). Nonetheless, in the case below, the trial court took a significant step in the direction of conferring "insurer" status on the railroad industry. The court's refusal to provide instructions on apportionment of damages–in fact, the court instructed the jury to disregard the principle of apportionment—rendered petitioner liable for damages suffered by its employees that it did not cause. Indeed, the decision below makes railroads the insurers against consequences flowing from not just their own conduct, but also of the conduct of other employers. Under this decision, rail employees with significant exposure to asbestos at other, non-rail jobs, are endowed with the ability to avoid the limitations on benefits mandated by the state workers' compensation laws governing work-related injuries arising in non-rail employment, and to shift the costs of those injuries onto the railroad industry.

Not only does this visit great unfairness on railroads, it ignores a well established and fundamental, yet oft forgotten, feature of FELA: that FELA jurisprudence is to be guided by common law principles. *Gottshall* 512 U.S. at 551. A fundamental principle of the common law is that defendants are liable only for damages that are attributable to their negligence, not for damages that are caused by other, independent acts or conditions. Where two or more causes have combined to harm a plaintiff, only one of which is attributable to defendant's negligence, damages should be apportioned among those causes, assuming there is a reasonable basis for determining the contribution of each cause to the harm. *Restatement (Second) of Torts* §433A.[21]

[21] Traditional common law rules of apportionment applied to divisible harms. The modern common law is evolving toward the concept of several liability even for indivisible harms, based on the principle that each party should be responsible only for the harm it caused. *See*

There is no reason apportionment should not apply to FELA cases; while some courts, like the court below, disregard this principle, others have adhered to it.[22] In *Dale v. Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989), the Pennsylvania Supreme Court ruled that under FELA "liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused." *Id.* at 1041. The *Dale* court went on to hold that

> an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id.

In *Dale*, the plaintiff's injury was partially caused by exposure to asbestos on the job and partially by his pre-existing asthma. In this case, while there was an allegation of asbestos exposure while working for the defendant, there also was evidence that some of the plaintiffs were similarly exposed at other jobs, in some cases for a far longer period than their employment with the railroad. In *Dale*, the highest court in Pennsylvania corrected the erroneous reading of FELA by a trial court; in this case, the highest court in West Virginia has refused even to consider a similarly erroneous decision by a lower court.

Restatement (Third) of Torts: Apportionment of Liability §§ 17, B18 (2000); Petition at 23.

[22] See cases cited in the Petition at 20-22.

B. Neither The Language Of FELA Nor This Court's Prior Decisions Alter The Common Law Rules Of Apportionment

The ruling below represents a striking example of how some courts, by deviating from common law principles, have misinterpreted FELA. The refusal of some courts to recognize the principle of apportionment of damages often grows out of a misreading of prior decisions of this Court, most notably *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957).[23] In *Rogers*, after the Missouri Supreme Court reversed a jury verdict for a rail employee, this Court held that the language of §51 of FELA requires submission of a case to the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. *Rogers* was clear that its holding pertained only to the test for a jury case.[24] There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

Rogers and its progeny have virtually assured that under FELA, assuming some competent evidence is proffered, a jury, and not a judge, will decide whether the elements of a negligence case have been proved by the plaintiff. Ironically, the court below prevented a jury from properly assessing the level of damages for which a defendant may be liable, in contrast to other courts which have recognized the important

[23] *See Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993), both citing to *Rogers* as justification for denying apportionment.

[24] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function*." 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied).

role of the jury on this issue. *E.g., Sauer v. Burlington Northern R.R.*, 106 F.3d 1490 (10th Cir. 1997)("Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494.)

Misinterpretation of *Rogers* by lower courts is not merely of academic interest: it has very real and serious financial consequences for railroads. The purpose of FELA is to provide a remedy for injuries suffered on the job due to the employer's negligence, not a broad insurance plan for rail workers.[25] Rulings that do not allow for apportionment of damages for causes other than the railroad's negligence blur that distinction and render railroads liable for damages they did not cause. This grafts an expensive insurance feature onto an already rich compensation system, under which damages for both pecuniary and non-pecuniary losses are virtually unlimited.[26]

This judicially created insurance feature is especially relevant in the current environment which has seen myriad FELA cases alleging occupational illnesses. *See supra* pp. 6-7. In these types of cases, factors wholly unrelated to railroad employment, frequently may cause part of the worker's disability. Rejection of the right to apportion damages prevents railroad defendants, where there is supporting evidence, from having the jury consider that a plaintiff's condition is largely the result of the independent causes.

[25] Under a separate federal statute, many rail employees can qualify for an occupational disability benefit if disabled, by any cause, from performing their railroad job. 45 U.S.C.§ 231a(a)(1)(iv). This unique benefit, which is part of the Railroad Retirement system is not available to Social Security employees. Rail employees are also eligible for benefits for total disability, as are Social Security workers. 45 U.S.C. § 231a(a)(1)(v).

[26] *See supra* note 7.

By refusing to give jury instructions on apportionment generally recognized at common law, the court below expanded railroad liability under FELA far beyond the bounds that were intended by Congress. This case provides an excellent opportunity for this Court to correct that error and provide clear guidance to lower courts.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Circuit Court of Kanawha County, West Virginia in this case should be granted.

Respectfully submitted,

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February 1, 2002

No. 01-963

(13)

SUPREME COURT, U.S.
FILED
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IN THE
Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

JOINT APPENDIX
Volume One

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June 17, 2002

PETITION FOR CERTIORARI FILED JANUARY 2, 2002
CERTIORARI GRANTED APRIL 1, 2002

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NOTICE

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

Case No. 92-C-16-8888

IN RE: ASBESTOS III,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/06/95	# Mot to amd C's to add Railroad D's W/Attach; Not of HRG W/COS.

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

Case No. 92-C-19-8888

IN RE: ASBESTOS III,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/10/1998	Memo of Law in Supp of Mot W/EXH's.
4/29/1998	Verdict Form of James Spangler; Verdict Form of Vance; Verdict Form of Ayers; Verdict Form of Shirley; Verdict Form of Johnson; Verdict Form of Butler.
1/06/1999	<O:MAC.
1/06/1999	<O: JDGMT O/MAC (S93-C-7004).
1/06/1999	<O: JDGMT O/MAC (92-C-8970).
1/06/1999	<O: JDGMT O/MAC (92-C-8888).
1/06/1999	<O: JDGMT O/MAC (93-C-6857).
1/06/1999	<O: JDGMT O/MAC (93-C-6876).
1/19/1999	D, Norfolk & Western Railway Co's Mot for Judg or For New Trial (92-C-5829, 93-C-6857, 93-C-6876, 93-C-7004, 92-C-8899, 92-C-8970).
1/19/1999	COS as to D. Norfolk & Western Railway Co's Mot for Judg or For New Trial & Not of HRG (93-C-6857)
1/19/1999	Not of HRG (93-C-6857).

DATE	PROCEEDINGS
2/22/2001	<O: Grting Norfolk Souther Railway Comp Mot to Vacate Entry of O Denying Mot for New Trial/MacMac (S2/12/01).
3/12/2001	Pet WVSCA; Desig; Cos; Docking Stmt; (92-C-5829; 93-C-7004; 93-C-6857; 92-C-8888; 92-C-8970; 93-C-6876) By Fred Adkins
3/12/2001	By Ck $150.00; RCT#319189
10/19/2001	* O Fr SCA Refusing Pet for Ap (92-C-5829).

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[Filed Oct. 15, 1992]

1. Delbert R. Adkins and Rosella Adkins, his wife — Civil Action No. 92-C-7698
2. Jeff Adkins, Jr. and Loretta Adkins, his wife — Civil Action No. 92-C-7699
3. Richard Curtis Akers and Ruby Akers, his wife — Civil Action No. 92-C-7700
4. Gene Thurman Archey and Norma Lee Archey, his wife — Civil Action No. 92-C-7701
5. Lester Kenneth Arnett and Glenoka M. Arnett, his wife — Civil Action No. 92-C-7702
6. James Harry Arthur and Betty June Arthur, his wife — Civil Action No. 92-C-7703
7. Burton Bailey Atkins and Glenna S. Atkins, his wife — Civil Action No. 92-C-7704
8. James Roy Ball and Ruby Ball, his wife — Civil Action No. 92-C-7705
9. Joel Dee Baisden and Brookie Baisden, his wife — Civil Action No. 92-C-7706
10. Everett E. Ballard, Sr. and Donna J. Ballard, his wife — Civil Action No. 92-C-7707
11. Arthur L. Barker and Peggy J. Barker, his wife — Civil Action No. 92-C-7708
12. Clyde Bates — Civil Action No. 92-C-7709
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14. Bernard Blake and Sarah F. Blake, his wife — Civil Action No. 92-C-7711
15. Grant Blevins — Civil Action No. 92-C-7712
16. Randall L. Blevins and Katheryn Blevins, his wife — Civil Action No. 92-C-7713
17. Carlos Elmo Blum and Margaret Blum, his wife — Civil Action No. 92-C-7714
18. Harold Ray Boggs and Betty Boggs, his wife — Civil Action No. 92-C-7715

19. Charles Bowen, Jr. and Pauline Bowen, his wife — Civil Action No. 92-C-7716
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21. Sterling Bowen and Violet Bowen, his wife — Civil Action No. 92-C-7718
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24. Willard T. Bradberry and Mary Bradberry, his wife — Civil Action No. 92-C-7721
25. Leon E. Bradshaw and [illegible]ry Bradshaw, his wife — Civil Action No. 92-C-7722
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30. Paul E. Campbell and Sheila Campbell, his wife — Civil Action No. 92-C-7727
31. Lewis B. Carico and Wanda Carico, his wife — Civil Action No. 92-C-7728
32. Jesse J. Cavanaugh and Lucille Cavanaugh, his wife — Civil Action No. 92-C-7729
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36. Douglas L. Combs and Phyllis Combs, his wife — Civil Action No..92-C-7733
37. Paul James Cooper — Civil Action No. 92-C-7734
38. Clyde E. Copley and Betty J. Copley, his wife — Civil Action No. 92-C-7735

39. Glen J. Corder and
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40. Earl Cox and
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41. Clyde E. Crouse and
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45. Henry E. Fankhouser — Civil Action No. 92-C-7742
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57. Ernest E. Higginbotham and
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58. Dana Holcomb (deceased) and
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59. Edward Honeycutt and
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60. Joe D. Howard and
Loretta Howard, his wife — Civil Action No. 92-C-7757
61. Clarence O. Hughes, Jr. and
Norma E. Hughes, his wife — Civil Action No. 92-C-7758
62. Frank E. Johnson and
Joyce E. Johnson, his wife — Civil Action No. 92-C-7759
63. Roscoe Johnson and
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66. Robert E. Keeton and
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67. William R. Kegley and
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68. William A. Kelly — Civil Action No. 92-C-7765
69. John R. Kessler and
Estelle Kessler, his wife — Civil Action No. 92-C-7766
70. Charles D. Kinder and
Shirley Kinder, his wife — Civil Action No. 92-C-7767
71. Darrell R. King and
Reba J. King, his wife — Civil Action No. 92-C-7768
72. Hessie E. Lake and
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73. Charles L. Lambert and
Ruth E. Lambert, his wife — Civil Action No. 92-C-7770
74. Albert B. Leadmon and
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75. Elmer W. Lengyel and
Anna H. Lengyel, his wife — Civil Action No. 92-C-7772
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79. Bobby D. Logan and Jewell K. Logan, his wife — Civil Action No. 92-C-7776
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81. Ralph Mason McCroskey and Eva J. McCroskey, his wife — Civil Action No. 92-C-7778
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88. William M. Menefree and Dorothy Menefree, his wife — Civil Action No. 92-C-7785
89. Robert L. Messer and Eula M. Messer, his wife — Civil Action No. 92-C-7786
90. Charles R. Miller and Nola A. Miller, his wife — Civil Action No. 92-C-7787
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97. Henry Payne — Civil Action No. 92-C-7794
98. Stanley E. Pennington and Phyllis Pennington, his wife — Civil Action No. 92-C-7795
99. Shelby Peters and Opal Peters, his wife — Civil Action No. 92-C-7796

100. A.G. Pettrey, Jr. and Margaret Pettrey, his wife — Civil Action No. 92-C-7797
101. James Pilney and Sophie Pilney, his wife — Civil Action No. 92-C-7798
102. Robert L. Porter and Lorene Porter, his wife — Civil Action No 92-C-7799
103. George Franklin Rice and Rosalee Rice, his wife — Civil Action No. 92-C-7800
104. Kenneth W. Richmond and Lois Richmond, his wife — Civil Action No. 92-C-7801
105. Gerald E. Roark and Ellouise Roark, his wife — Civil Action No. 92-C-7802
106. Mitchell Roark and Virgie M. Roark, his wife — Civil Action No. 92-C-7803
107. Charles E. Rogers — Civil Action No. 92-C-7804
108. Dan L. Rowsey and Norma Rowsey, his wife — Civil Action No. 92-C-7805
109. Stanley Royster and Helen Royster, his wife — Civil Action No. 92-C-7806
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111. Paul D. Searls and Rita S. Searls, his wife — Civil Action No. 92-C-7808
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115. Eugene Stowers and June Stowers, his wife — Civil Action No. 92-C-7812
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117. Loren G. Stratton and Lola M. Stratton, his wife — Civil Action No 92-C-7814
118. George P. Tardy and Marhla Tardy, his wife — Civil Action No. 92-C-7815
119. Charles Thompson and Lillie Thompson, his wife — Civil Action No. 92-C-7816

120. Charles R. Thompson and Edra Thompson, his wife	Civil Action No. 92-C-7817
121. Manley A. Thompson	Civil Action No. 92-C-7818
122. Carl E. Toney and Pearlie Toney, his wife	Civil Action No. 92-C-7819
123. Clifford A. Vance and Evelyn Vance, his wife	Civil Action No. 92-C-7820
124. Beechie M. Ward	Civil Action No. 92-C-7821
125. Ronald L. Ward	Civil Action No. 92-C-7822
126. Larry O. Webb and Sandra Webb, his wife	Civil Action No. 92-C-7823
127. Gene Wells and Phyllis Wells, his wife	Civil Action No. 92-C-7824
128. Ira E. Wells, Jr. and Sara Wells, his wife	Civil Action No. 92-C-7825
129. Herman C. Whitney	Civil Action No. 92-C-7826
130. Cliffors L. Williams and Hazel Williams, his wife	Civil Action No. 92-C-7827
131. Cledith A. Wilson	Civil Action No. 92-C-7828
132. Edsel F. Yates and Ruth M. Yates, his wife	Civil Action No. 92-C-7829

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
Penn Central Corporation (PCC)
As successor to Penn Central Company,
Penn Central Railroad and
Central Railroad of New York
A Pennsylvania Corporation
Serve: CT Corporation
1600 Charleston Nat'l Plaza
Charleston, WV 25301

CSX TRANSPORTATION
INCORPORATION, INC.
Individually and as successor
to the Chesapeake & Ohio
Railroad Company,
A Virginia Corporation
Serve: A.F. Bobersky
Chafin Bldg, 517 9th Street
Huntington, WV 25701

NORFOLK SOUTHERN RAILWAY CO.
Individually as successor to
Southern Railway Company
and the Virginian Railroad,
A Virginia Corporation
Serve: President/CEO
3 Commercial Place
Norfolk, VA 23510-2108

NORFOLK SOUTHERN CORPORATION
Individually and as successor
to the Virginian Railroad,
A Virginian Corporation
Serve: President/CEO
3 Commercial Place
Norfolk, VA 23510-2108

NORFOLK AND WESTERN RAILWAY CO.
Individually and as successor
to the Norfolk Southern
Railway Company,
A Virginia Corporation
Serve: Richard A. Keeney
8 North Jefferson Street
Roanoke, VA 24042

OWENS CORNING FIBERGLAS CORP.
Serve: President/CEO
National Bank Building
Toledo, OH 43604

A&I COMPANY
Serve: C.P. Guthrie
5020 Kanawha Turnpike
Box 9277
Charleston, WV 25309

ABEX CORPORATION
Serve: President/CEO
485 Frontage Road
Burr Ridge, IL 60521

ANCHOR PACKING COMPANY
Serve: CT Corporation Systems
2 Peachtree Street
Atlanta, GA 30383

A.P. GREEN INDUSTRIES, INC.
Serve: Corporate Trust Company
1209 Orange Street
Wilmington, DE 19801

ARMSTRONG WORLD INDUSTRIES, INC.
Serve: W.M. Woodroe
Charleston National Plaza
Charleston, WV 25301

CERTAINTEED CORPORATION.
Serve: President/CEO
P. O. Box 860
Valley Forge, PA 19482

DURAMETALLIC CORPORATION
Serve: C.T. Corporation Systems
P. O. Box 951
Charleston, WV 25323

FIBREBOARD CORPORATION
Serve: President/CEO
1000 Burnett Avenue
Suite 410
Concord, CA 94520

FLEXITALLIC, INC.
Serve: President/CEO
P. O. Box 848
Bellmar, NJ 08031

THE FLINTKOTE COMPANY
Serve: President/CEO
c/o Mossman, Guther,
Knox and Elliott
50 California Street
34th Floor
San Francisco, CA 94111

GAF CORPORATION
Serve: Prentice Hall Corporation
32 Lockerman Square, East
Suite L-100
Dover, DE 19901

GARLOCK, INC.
Serve: President/CEO
1666 Division Street
Palmyra, NY 14522

GEORGIA-PACIFIC CORPORATION
Serve: C.T. Corporation Systems
P. O. Box 951
Charleston, WV 25323

GENERAL ELECTRIC COMPANY
Serve: President/CEO
3135 Easton Turnpike
Fairfield, CONN 06431

INSUL COMPANY INCORPORATED
Serve: President/CEO
110 N. Market Street
East Palestine, OH 44413-2095

J.A. JONES CONSTRUCTION COMPANY
Serve: President/CEO
6060 St. Albans Street
One South Executive Park
Charlotte, NC 28287

KEENE CORPORATION
Serve: President/CEO
200 Park Avenue
New York, NY 10166

METROPOLITAN LIFE INSURANCE COMPANY
Serve: President/CEO
1 Madison Avenue
New York, NY, 10010

M.H. DETRICK COMPANY
Serve: President/CEO
19444 S. 97th Avenue
Box 270
Makena, IL 60448

NATIONAL GYPSUM COMPANY
Serve: President/CEO
325 Delaware Avenue
Buffalo, NY 14202

PITTSBURGH CORNING CORPORATION
Serve: President/CEO
800 Presque Isle Drive
Pittsburgh, PA 15239

PPG INDUSTRIES, INC.
Serve: President/CEO
One PPG Place
Pittsburgh, PA 15272

QUIGLEY COMPANY, INC.
Serve: C.T. Corporation Systems
P. O. Box 951
Charleston, WV 25323

QUIN-T CORPORATION
Serve: CENTER FOR CLAIMS RESOLUTION
500 College Road East
Princeton, NJ 54840

ROCKWOOL MANUFACTURING CORPORATION
Serve: President/CEO
500 Thornton Avenue
Leeds, AL 35094

TURNER & NEWELL, PLC
Serve: President/CEO
Bowden House
Ashburton Road West
Trafford Park
Manchester M17 1RA
England

UNION BOILER
Serve: David K. Baxter
P.O. Box 1425
Nitro, WV 21543

UNITED STATES GYPSUM COMPANY
Serve: President/CEO
101 S. Wacker Drive
Chicago, IL 60606

WESTINGHOUSE ELECTRIC CORPORATION
Serve: President/CEO
Six Gateway Center
Pittsburgh, PA 15222

W.R. GRACE COMPANY—CONN.
Serve: C.T. Corporation Systems
P. O. Box 951
Charleston, WV 25323
Defendants.

ORIGINAL COMPLAINT AND JURY DEMAND

The plaintiffs, by their undersigned counsel, hereby bring suit against the defendants and for causes of action allege as follows:

(JURISDICTION AND VENUE)

1. The plaintiffs named herein are residents and citizens of the State of West Virginia, Kentucky and Ohio and were exposed to asbestos and other harmful dusts in West Virginia, Kentucky and Ohio.

2. The defendants herein are corporations some of which are West Virginia corporations and some of which are Ohio corporations.

3. All of the defendants are either licensed and registered to do business in the State of West Virginia or have done business in the state by putting their products into the stream of commerce in the State of West Virginia.

4. All of the plaintiffs' claims exceed the jurisdictional minimum for this court.

5. Based upon the above, jurisdiction and venue is proper in this case.

COUNT I

(FELA—Railroad Defendants Only)

6. This is an action for asbestos related personal injuries arising under the provisions of the Federal Employer's Liability Act, 45 U.S.C. Section 51, et seq., specifically including the Federal Safety Appliance Act, 45 U.S.C. Sections 1 through 16, The Locomotive Boiler Inspection Act, 45 U.S.C. Sections 22 through 34 and common law negligence principles.

7. This Court has jurisdiction over this case under 45 U.S.C. Section 51 et seq. and 28 U.S.C. Section 1445 (non-removable actions).

8. The Plaintiffs were all employees of the railroad and contracted occupational diseases within the scope of that employment.

9. The amount in controversy, exclusive of interest and costs, exceeds the jurisdictional amount of this Court and this Court has jurisdiction and venue hereof.

10. CSX Transportation, Inc. is a successor to the Chesapeake & Ohio Railroad Company and is a Virginia corporation. Hereinafter, this defendant is referred to as "the railroad".

11. Norfolk and Western Railway Company is a Virginia corporation and is a wholly owned subsidiary of Norfolk Southern Railway Company. Hereinafter, this defendant is referred to as "N&W". All of the allegations contained in Count I attributable to "the railroad" are likewise attributable to this defendant.

12. During his employment with the railroad, each Plaintiff was exposed to asbestos and asbestos-containing products on a repeated basis as well as other harmful dusts. Plaintiff was required by the railroad to work with and near toxic asbestos and asbestos-containing products and other harmful dusts.

13. The Plaintiffs were unaware of the toxic propensities of the asbestos and asbestos-containing products and other harmful dusts to which they were exposed.

14. As a direct and proximate result of their exposure to asbestos and asbestos-containing products and other harmful dusts, without any lack of due care on their part, each Plaintiff contracted asbestosis and other dust diseases related to such exposure.

15. The Plaintiffs were unaware of the cause of their latent and deteriorating medical condition until diagnosed as suffering from same within the last two (2) years.

16. The railroad owed each Plaintiff a duty to have him, work in a safe employment environment under the Federal Employer's Liability Act.

17. The railroad, by and through its duly authorized agents, breached this duty to each plaintiff by:

(a) Failing to provide Plaintiff with a reasonably safe work place;

(b) Failing to furnish Plaintiff with safe and suitable tools and equipment including adequate protective masks and protective inhalation devices;

(c) Failing to warn Plaintiff of the true nature and hazardous effects of asbestos and asbestos-containing products;

(d) Failing to operate a locomotive repair facility in a reasonably safe manner;

(e) Failing to provide instructions or a method for the safe use of asbestos;

(f) Failing to provide adequate, if any, instructions in the use or removal of old asbestos products;

(g) Failing to test asbestos-containing products prior to requiring employees to work with the same, to determine their ultra-hazardous nature;

(h) Formulating and using a method of handling asbestos and asbestos-containing products which exposed Plaintiff to high concentrations of asbestos fibers;

(i) Failing to provide Plaintiff with safe and proper ventilation systems in the railroad facilities;

(j) Allowing unsafe practices to become standard practice;

(k) Failing to exercise reasonable care in publishing and enforcing a safety plan and method of handling and installing asbestos and asbestos-containing products;

(l) Failing to inquire of the suppliers of asbestos and asbestos-containing products, the nature of asbestos;

(m) Requiring Plaintiff to work with ultra-hazardous asbestos and asbestos-containing products;

(n) Failing to exercise adequate, if any, care for the health and safety of Plaintiff;

(o) Failing to periodically test and examine Plaintiff to determine if he was subject to any ill effects of his exposure to asbestos and asbestos-containing products; and

(p) Failing to periodically inspect its locomotives, boilers and their appurtenances in order to ascertain any contamination by asbestos fibers.

18. As a direct and proximate result of the breach of duty by the railroad, each Plaintiff was exposed to toxic asbestos and asbestos-containing products and other harmful dusts.

19. As a direct and proximate result of the negligence of the railroad, each Plaintiff has suffered personal injury, great pain, extreme anxiety, and he truly believes his injuries and disability are permanent; his earning capacity has been greatly reduced; his enjoyment of life has been greatly diminished; and his expected life span has been greatly shortened.

20. As a direct and proximate result of the negligence of the railroad, each Plaintiff, because of health problems caused by this negligence, has been forced to incur medical expenses for doctors, hospitals, drugs and health care services, and he truly believes that he will be forced to incur additional expenses in the future in an effort to treat his condition.

21. Each Plaintiff was a strong, able-bodied workman capable of gainful employment at the time of the manifestation of his illness. As a result of his illness, each Plaintiff has suffered damages by way of lost wages and a diminished ability to render services, society, affection, counseling and support to his household.

WHEREFORE, each Plaintiff claims compensatory damages in the amount deemed sufficient by the jury with interest and costs of suit herein.

COUNT II

(Negligence)

22. Over the course of their working years, the first named plaintiffs (hereinafter "the plaintiffs") worked with and/or around products containing asbestos and/or other harmful minerals manufactured, supplied, sold, distributed and installed by the defendants. As a result, the plaintiffs breathed asbestos and other harmful dusts created by the use of said products, and developed serious, permanent and disabling lung diseases.

23. The defendants and each of them by their agents, servants and employees were negligent in that they knew or

should have known that the use of their products would cause serious lung diseases and cancer, and knowing same, did fail to take reasonable precautions to warn the plaintiffs of the dangers to which they were exposed, did fail to inform the plaintiffs of what would be safe and sufficient wearing apparel and safety equipment for persons who were exposed to their products, did fail to inform the plaintiffs of what would be safe and proper methods of handling and using the products, did fail to remove the products from the market when they knew or should have known of the hazards associated with the use of the products, did fail to properly and adequately label the products, did sell the products which were not in a reasonably safe condition, did fail to supply accurate and complete warnings of the known dangers involved in the use of and exposure to the products, did fail to use safe, substitute products when such were available, did negligently install the products without taking precautions to warn and protect the plaintiffs.

24. Such actions and failure to act on the part of each defendant constituted malicious, willful and wanton misconduct with complete disregard for the safety and rights of others, amounting to extraordinary and outrageous conduct especially when the defendants were aware of scientific and medical data made available to them that their products were harmful and deadly to workers who were exposed to them.

25. As a direct and proximate result of the negligence of the defendants which caused them to develop serious, permanent and disabling lung diseases, each plaintiff has suffered damages including but not limited to medical expenses, great pain of body and mind, embarrassment, inconvenience, loss of wages and wage earning capacity, loss of the quality and enjoyment of their lives, shortening of their life expectancy, increased risk of cancer and mesothelioma with the worry and concern that naturally flows from such increased risk, permanent and disabling injury, all of which will continue into the future.

WHEREFORE, each plaintiff individually demands judgment against the defendants, jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT III—STRICT LIABILITY

26. The plaintiffs incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1-25 above.

27. At the time the defendants placed their products on the market, such products contained defects which created an unreasonable risk of harm to those likely to use or be exposed to the product, to wit; (a) exposure to the product caused cancer and lung diseases, (b) no warning or an inadequate warning was given to users or persons exposed to the product.

28. At the time of plaintiffs exposure, the products were being used for the purposes for which they were intended, the products were in substantially the same condition as when they left the control of each of the defendants and the plaintiffs had no knowledge of the defects and no reason to suspect a defective condition.

29. As a sole, direct and proximate result of the defective products manufactured, supplied and sold by the defendants, the plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendants, jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT IV—CONSPIRACY

30. The plaintiffs were employed in capacities which placed them in close proximity with asbestos and asbestos-related materials, manufactured and/or distributed by one or more of the defendants. Plaintiffs' presence was known or should have been known to the defendants and each of them.

31. The plaintiffs were exposed to the asbestos products manufactured by one or more of the defendants named in paragraph 16 below. The exposure to the asbestos or asbestos-related products manufactured by the defendants proximately contributed to the disease suffered by plaintiffs as described below.

32. The defendants as specifically identified below, individually and as agents of one another and as co-conspirators, agreed and conspired among themselves and with other asbestos manufacturers and distributors to injure the plaintiff in the following fashion:

(a) Beginning in approximately 1934, conspirator Johns-Manville Corporation, through its agents, Vandiver Brown and attorneys J.C. Hobart, and conspirator Raybestos-Manhattan, through its agents, Sumner Simpson and J. Rohrbach, suggested, to Dr. Anthony Lanza, Associate Director, Metropolitan Life Insurance Company (insurers of Manville and Raybestos), that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent a material fact about asbestos exposure; that is the seriousness of the disease process, asbestosis. This was accomplished through intentional deletion of Lanza's description of asbestosis as "fatal" and through other selective editing that affirmatively misrepresented asbestos [sic] as a disease process less serious than it actually is and was known to be then. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent

misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raybestos and Metropolitan Life, as insurer.

(b) In 1936, conspirators American Brake Block Corporation, Asbestos Manufacturing Company, Gatke Corporation, Johns-Manville Corporation, Keasby & Mattison Company (then an alter-ego to conspirator Turner & Newall), Raybestos-Manhattan, Russell Manufacturing (whose liabilities have been assumed by H.K. Porter Company), Union Asbestos and Rubber Company and United States Gypsum Company, entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac Laboratories could publish about asbestos disease and could also control in what form such publications were to occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to suppress material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.

(c) On November 11, 1948, representatives of the following conspirators met at the headquarters of Johns-Manville Corporation: American Brake Block Division of American Brake and Shoe Foundry, Gatke Corporation, Keasby & Mattison Company (then an alter-ego to conspirator Turner & Newall), Raybestos-Manhattan, Inc., Thermoid Company (whose assets and liabilities were later purchased by H.K. Porter Company), Union Asbestos and Rubber Company and United States Gypsum Company. U.S. Gypsum did not send a representative to the meeting, but

instead authorized Vandiver Brown of Johns-Manville to represent its interest at the meeting and to take action on its behalf.

(d) At this November 11, 1948 meeting, these defendants and their representatives decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved the carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.

(e) At this meeting, these defendants intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensity of asbestos and the health effects of asbestos on humans and the critique of the dust standards and then published same in the medical literature as edited by Dr. Vorwald. These defendants thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and the class of persons exposed to asbestos, including the plaintiffs.

(f) As a direct result of influence exerted by the above-described conspirators, Dr. Vorwald published Dr. Gardner's edited work in the *Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health* in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to university libraries, government officials, agencies and others.

(g) Such action constited [sic] a material affirmative misrepresentation of the total context of material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was less of a health problem than Dr. Gardner's unedited work indicated.

(h) The following conspirators were members of the trade association known as Quebec Asbestos Mining Association (Q.A.M.A.): Johns-Manville Corporation, Carey-Canada, individually and as successor to Quebec Asbestos Corporation, the Celotex Corporation, successor to Quebec Asbestos Corporation, National Gypsum Company, and Turner & Newall, individually and successor to Bell Asbestos. These conspirators, members of Q.A.M.A., participated in the above-described misrepresentation of the work of Dr. Leroy Gardner published by Arthur Vorwald in the *AMA Archives of Industrial Health* in 1951. Evidence of the Q.A.M.A.'s involvement in this misrepresentation arises from co-conspirator Johns-Manville's membership of the Q.A.M.A., as well as correspondence from co-conspirators dated 10/29/47, 11/26/47, 3/6/38, 10/15/48, 3/8/49 and 9/6/50, and all indicating close monitoring of the editing process of Q.A.M.A.'s representative, Ivan Sabourin, acting on behalf of all Q.A.M.A. members.

(i) Defendants who were members of the Q.A.M.A. as described above, began on or about 1950 to formulate a plan to influence public opinion about the relationship between asbestos and cancer by influencing the medical literature on this subject and then touting and disseminating this literature to the public and to organizations and legislative bodies responsible for regulatory control of asbestos with the specific intent of misrepresenting the existing scientific information and suppressing contrary scientific data in their possession and control.

(j) This plan of misrepresentation and influence over the medical literature began on or about 1950 when the

aforementioned Q.A.M.A. members selected Saranac Laboratories to do an evaluation of whether cancer was related to asbestos. After a preliminary report authored by Arthur Vorwald in 1952 indicated that a cancer/asbestos relationship might exist in experimental animals, these Q.A.M.A. members refused to further fund the study and it was terminated and never publicly discussed.

(k) As a result of the termination of this study, these defendants fraudulently withheld information from the public and affirmatively misrepresented to the public and responsible legislative and regulatory bodies that asbestos did not cause cancer, including affirmative misrepresentations by conspirators' agents K.W. Smith, M.D., Paul Cartier, M.D., A.J. Vorwald, M.D., A. J. Lanza, M.D., Vandiver Brown and Ivan Sabourin, said misrepresentations being directed to *inter alia*, U.S. Government officials, Canadian government officials, U.S. National Cancer Institute, other medical organizations and the general public, including plaintiffs.

(l) Subsequently, the Q.A.M.A. defendant conspirators contracted with the Industrial Hygiene Foundation and Dr. Daniel Braun to further study the relationship between asbestos exposure, asbestosis and lung cancer. In 1957, Drs. Brown and Truan reported to the Q.A.M.A. that asbestosis did increase a worker's chances of incurring lung cancer.

(m) The Q.A.M.A. defendant conspirators/members thereafter caused, in 1958, a publication of the work by Braun and Truan in which the findings regarding increased incidence of cancer in persons with asbestosis was edited out by agents of the Q.A.M.A. The published version of this study contained a conclusion that asbestos exposure, alone, did not increase the incidence of lung cancer, a conclusion known by the defendant conspirators to be patently false.

(n) By falsifying and causing publication of studies concluding that asbestos exposure did not cause lung cancer and simultaneously omitting a documented finding that

asbestosis did increase the risk of lung cancer, these Q.A.M.A. defendant conspirators affirmatively misrepresented to the public and concealed from the public the extent of risks associated with inhalation of asbestos fibers.

(o) In approximately 1958, these Q.A.M.A. defendant conspirators publicized the edited works of Drs. Braun and Truan at a symposium in an effort to fraudulently misrepresent to the public and persons exposed to asbestos that the inhalation of asbestos dust would not cause cancer.

(p) The fraudulent misrepresentations beginning in 1946 as elaborated above and continuing with the publication of the 1958 Braun/Truan study influenced the standards set for threshold limit values for development of such standards to fail to lower the threshold limit value because of a cancer risk associated with asbestos inhalation.

(q) In 1967, Q.A.M.A. conspirators determined at their trade association meeting that they would intentionally mislead consumers about the extent of risks involved in inhalation of asbestos products.

(r) In 1952, a Symposium regarding the health effects of asbestos was held at the Saranac Laboratories. The following conspirators were in attendance: Johns-Manville, Turner & Newall, Raybestos-Manhattan, and Q.A.M.A. members by way of their agents, Cartier, Sabourin and LaChance.

(s) At this meeting, the occurrence of lung cancer and asbestosis in product users was discussed and the carcinogenic properties of all fiber types of asbestos was also discussed. In an affirmative attempt to mislead the public about the extent of health risks associated with asbestos, and in an effort to fraudulently conceal those risks from the public, these defendants conspired to prevent publication of the record of this 1952 Saranac Symposium and it was not published. In addition, the conspirators induced Vorwald not to announce the results of his and Gardner's animal studies

showing excess cancers in animals which thereby fraudulently misrepresented existing secret data which could not be publicized owing to the secrecy provisions contained in the 1936 Saranac agreement heretofore described.

(t) The following conspirators were members of the trade organization known as the Asbestos Textile Institute (ATI): Raybestos-Manhattan, Johns-Manville, H.K. Porter, Keasby & Mattison, individually and through its alter-ego Turner & Newall and National Gypsum.

(u) In 1947, these conspirators, members of the ATI, received a report from W.C.L. Hemeon regarding asbestosis, which suggested re-evaluation of the then-existing threshold limit values for asbestos exposure. These defendants caused this report not to be published and thereby fraudulently concealed material facts about asbestos exposure from the public and affirmatively misrepresented to the public and class of persons exposed to asbestos that the existing threshold limit value was acceptable. Thereafter, these defendant conspirators withheld additional material information on the dust standards from The American Conference of Governmental Industrial Hygienists (ACGIH), thereby further influencing evaluations of threshold limit values for asbestos exposure.

(v) In 1953, conspirator National Gypsum, through its agents, in response to an inquiry from the Indiana Division of Industrial Hygiene regarding health hazards of asbestos spray products, refused to mail a proposed response to that division indicating that respirators should be worn by applicators of the products. National Gypsum's response distorted and fraudulently misrepresented the need for applicators of asbestos spray products to wear respirators and fraudulently concealed from such applicators the need for respirators.

(w) In 1955, conspirator Johns-Manville, through its agent Kenneth Smith, caused to be published in the *AMA Archives of Industrial Health*, an article entitled "Pul-

monary Disability in Asbestos Workers." This published study materially altered the results of an earlier study in 1949 concerning the same set of workers. This alteration of Dr. Smith's study constituted a fraudulent and material misrepresentation about the extent of the risk associated with asbestos inhalation.

(x) In 1955, the National Cancer Institute held a meeting at which conspirator Johns-Manville, individually and as an agent for other alleged co-conspirators and A. Vorwald, as agent of co-conspirators, affirmatively misrepresented that there were no existing animal studies concerning the relationship between asbestos exposure and cancer, when, in fact, the conspirators were in secret possession of several studies which demonstrated that positive evidence did exist.

(y) In 1957, these conspirators, members of the ATI, jointly rejected a propose [sic] research study on cancer and asbestos and this resulted in fraudulently concealed from the public material facts regarding asbestos exposure and also constituted an affirmative misrepresentation of the then-existing knowledge about asbestos exposure and lung cancer.

(z) In 1964, conspirators who were members of the ATI met to formulate a plan for rebutting the association between lung cancer and asbestos exposure that had been recently discussed by Dr. Irving J. Selikoff. Thereafter, these members of the ATI embarked upon a campaign to further misrepresent the association between asbestos exposure and lung cancer.

(aa) All conspirators identified above approved and ratified and furthered the previous conspiratorial acts of conspirators Johns-Manville, Raybestos Manhattan and A.J. Lanza, acting on behalf of Metropolitan Life Insurance company, and all alleged co-conspirators during the dates and circumstances alleged above, acted as agents and co-conspirators for the other conspirators.

33. The acts of the defendant conspirators as described above, constitute a fraudulent concealment and/or a fraudulent misrepresentation which proximately caused injury to the plaintiffs in the following manner:

(a) The material published or caused to be published by the defendants was false and incomplete in that the defendants knowingly and deliberately deleted references to the known health hazards of asbestos and asbestos-related products.

(b) Defendants individually, as members of a conspiracy, and as agents or other co-conspirators, intended that the publication of false and misleading reports and/or the nondisclosure of documented reports of the health hazards of asbestos:

(1) maintain a favorable atmosphere for the continued sale and distribution of asbestos and asbestos-related products;

(2) assist in the continued pecuniary gain of the defendants through the sale of their products;

(3) influence in the defendants' favor proposed legislation to regulate asbestos exposure and;

(4) to provide a defense in law suits brought for injury resulting from asbestos disease.

(c) Plaintiffs reasonably relied upon the published medical and scientific data documenting the purported safety of asbestos and asbestos-related products, and the absence of published medical and scientific reports on the hazards of asbestos and asbestos-related products to continue their exposure to asbestos because they believed it to be safe.

(d) Defendants individually, as members of a conspiracy, and as agents of other co-conspirators intended that plaintiffs rely upon the published reports regarding the safety of asbestos and asbestos-related products and upon the

absence of published medical and scientific data regarding the hazards of asbestos and asbestos-related products, to continue their exposure to those products.

(e) Defendants individually, as members of a conspiracy, and as agents of other co-conspirators are in a position of superior knowledge regarding the health hazards of asbestos and therefore plaintiffs had a right to rely on the published reports commissioned by the defendants regarding the health hazards of asbestos and the absence of published medical and scientific data regarding the hazards of asbestos and asbestos-related products.

(f) Plaintiffs suffered injury as a direct and proximate result of the acts alleged herein, and damages as described in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendants, jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT V—WRONGFUL DEATH

34. The plaintiffs incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 33 above.

35. Certain plaintiffs are representatives of the estates of deceased workers. In those cases, this action is brought pursuant to the Wrongful Death Statute since the decedent died as a direct and proximate result of exposure to asbestos and other harmful dusts caused by the wrongful acts and omissions and defective products of the defendants herein. The decedents at the time of death had beneficiaries and distributees as defined by the Wrongful Death Statute.

36. As a proximate result of the aforementioned wrongful acts and omissions of the defendants and exposure to the defendants' defective products, the decedents suffered prior to their death severe physical pain, mental anguish, worry, loss of enjoyment of life, loss of income and medical expenses. As a result of the decedents' death, funeral and burial expenses were incurred, there was a loss of future income and the decedents' beneficiaries and statutory distributees have suffered sorrow mental anguish, loss of society, loss of companionship, loss of comfort, loss of guidance and advice, loss of services, protection, care and assistance as well as a loss of the benefit of the decedents' income.

WHEREFORE, each plaintiff individually demands judgment against the defendants, jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT VI—LOSS OF CONSORTIUM

37. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 20 above. Plaintiffs' spouses have by reason of the lung diseases and disabilities suffered by the first named plaintiff have themselves suffered and will continue to suffer into the future the permanent loss of the consortium, guidance, kindly office, support and services of their spouses as well as damage to the marital relationship.

WHEREFORE, each plaintiffs' spouse individually demands judgment against the defendants, jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT VII (PPG ONLY)

(Negligence)

38. Defendant PPG Industries, Inc. (hereinafter "PPG") is the parent corporation of Pittsburgh-Corning Corporation, (hereinafter "subsidiary") a former manufacturer and marketer of asbestos-containing products.

39. Plaintiffs were exposed to the asbestos-containing products manufactured by the subsidiary.

40. At all times relevant herein, defendant PPG intervened on behalf of its subsidiary and researched the dangers and health consequences of asbestos exposure.

41. Defendant and its subsidiary shared a common medical director who conducted the research on the hazards of asbestos exposure.

42. Through this undertaking, defendant created a duty to those, like plaintiffs, who would come in contact with the asbestos contained in the products manufactured by its subsidiary.

43. Defendant, upon assuming this duty and responsibility, failed to perform with reasonable care.

44. Defendant PPG created a dangerous, harmful and potentially deadly situation by not sharing its data on the dangers of asbestos exposure with those reasonably likely to be exposed, such as plaintiffs.

45. Defendant breached its duty to plaintiffs by:

(a) failing to reasonably warn plaintiffs of the hazards of asbestos exposure;

(b) failing to act reasonably with regard to the information it possessed concerning the hazards of exposure to asbestos;

(c) failing to provide plaintiffs with the knowledge as to the possible precautions to protect against the harmful effects of asbestos exposure;

(d) failing to share its data on the dangers of asbestos exposure with those reasonably likely to be exposed, such as plaintiffs;

(e) concealing the information it possessed about the hazards of asbestos from those reasonably likely to be exposed, such as plaintiffs; and

(f) was otherwise negligent.

46. As a direct and proximate result of the negligence of defendant PPG Industries, Inc., plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT VIII (PPG ONLY)

(Restatement of Torts Sec. 324A(a))

47. Plaintiffs repeat and reallege all allegations contained in paragraphs 38 to 46 above.

48. Defendant PPG undertook to render services for its subsidiary; to wit; research on the health effects of asbestos exposure.

49. Defendant PPG did or reasonably should have recognized this undertaking was necessary for the protection of third parties.

50. Defendant PPG breached this duty to third parties, such as the plaintiffs, by failing to exercise reasonable care to protect them from or warn them of the health hazards of asbestos exposure.

51. Defendant's failure to exercise reasonable care increased the risk of harm.

52. As a direct and proximate result of the negligence of defendant PPG Industries, Inc., plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT IX (PPG ONLY)

(Restatement of Torts Sec. 324A(b))

53. Plaintiffs repeat and reallege all allegations contained in paragraphs 38 through 52 above.

54. Defendant PPG's subsidiary owed a duty to plaintiffs to reasonably research the health effects of asbestos exposure.

55. Defendant PPG undertook to perform this duty owed to plaintiffs.

56. Defendant PPG breached this duty it undertook to perform for its subsidiary by:

(a) failing to reasonably warn plaintiffs of the hazards of asbestos exposure;

(b) failing to act reasonably with regard to the information it possessed with regard to the hazards of exposure to asbestos;

(c) failing to provide plaintiffs with the knowledge as to the possible precautions to protect against the harmful effects of asbestos exposure;

(d) failing to share its data on the dangers of asbestos exposure with those reasonably likely to be exposed, such as plaintiffs;

(e) concealing the information it possessed about the hazards of asbestos from those reasonably likely to be exposed, such as plaintiffs; and

(f) was otherwise negligent.

57. As a direct and proximate result of the negligence of defendant PPG Industries, Inc., plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT X (PPG ONLY)

(Restatement of Torts Sec. 324(c))

58. Plaintiffs repeat and reallege all allegations contained in paragraphs 38 through 57 above.

59. Plaintiffs relied to their detriment on the undertaking of defendant PPG to research and warn them of the health hazards of asbestos exposure.

60. As a direct and proximate result of the negligence of defendant PPG Industries, Inc., plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT XI (PPG ONLY)

(Conspiracy)

61. Plaintiffs repeat and reallege all allegations contained in paragraphs 38 through 60 above.

62. Defendant PPG and its subsidiary, individually and in concert with each other and others, knowingly agreed and conspired among themselves to engage in a course of conduct that was reasonably likely to result in injury to the plaintiffs.

63. Defendant PPG knew or should have known that the failure of its subsidiary to warn plaintiffs of the harmful effects of asbestos exposure would cause plaintiffs injury.

64. Defendant PPG gave substantial assistance and/or encouragement to its subsidiary is [sic] accomplishing the injury to the plaintiffs.

65. As a direct and proximate result of the conspiracy between defendant PPG and its subsidiary, plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., jointly and severally, for compensatory damages in an amount deemed just and proper by the jury to adequately and fully compensate them for their damages and punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

COUNT XII (PPG ONLY)

(Punitive Damages)

66. Plaintiffs repeat and reallege all allegations contained in paragraphs 38 through 65 above.

67. The acts of defendant PPG were willful, wanton, malicious and in total disregard for the rights, health and safety of the plaintiff and others.

68. As a direct and proximate result of these acts, plaintiffs developed severe, permanent and disabling lung diseases and suffered the damages and losses enumerated in Count I above.

WHEREFORE, each plaintiff individually demands judgment against the defendant, PPG Industries, Inc., for punitive damages in an amount deemed just by the jury, with interest and costs of suit herein.

JURY DEMAND

The plaintiffs demand a trial by jury on all issues presented herein.

Plaintiffs
By Counsel

James F. Humphreys
Charleston National Plaza
Suite 1113
Charleston, WV 25301
(304) 343-4185

Ness, Motley, Loadholt,
Richardson & Poole

by: _____

James H. Rion, Jr.
P. O. Box 1137
Charleston, SC 29402
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IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

[Filed Feb. 3, 1995]

Frank Adams,	CIVIL ACTION NO. 93-C-3884
Thomas F. Adams,	CIVIL ACTION NO. 93-C-3886
Clarence Howard Anderson,	CIVIL ACTION NO. 92-C-7857
Freeman Ray Ayers,	CIVIL ACTION NO. 93-C-6857
James Michael Barlow,	CIVIL ACTION NO. 93-C-4891
Henry Ross Bartholow,	CIVIL ACTION NO. 93-C-4892
Benjamin Maywood Blecher,	CIVIL ACTION NO. 93-C-3913
George Garland Beloat,	CIVIL ACTION NO. 93-C-153
Nathan Donald Bennett,	CIVIL ACTION NO. 93-C-6159
Nolice Eugene Berry,	CIVIL ACTION NO. 92-C-4052
John Walker Berryman,	CIVIL ACTION NO. 93-C-3921
Doyle Thomas Bias,	CIVIL ACTION NO. 93-C-3925
Richard Mitchell Bland	CIVIL ACTION NO. 92-C-4055
Robert Everett Bledsoe,	CIVIL ACTION NO. 93-C-3943
Verrell Leon Bledsoe,	CIVIL ACTION NO. 93-C-3944
Henry Block,	CIVIL ACTION NO. 92-C-4057
Charles Frederick Bonner,	CIVIL ACTION NO. 93-C-4859
James Patrick Bowers,	CIVIL ACTION NO. 93-C-6863
Joe Bradac,	CIVIL ACTION NO. 93-C-6166
Melvin Minor Bragg, Sr.,	CIVIL ACTION NO. 93-C-6865
Billy Clay Brown,	CIVIL ACTION NO. 93-C-6871
Danny Joe Brown,	CIVIL ACTION NO. 93-C-3960
William Henry Brown,	CIVIL ACTION NO. 92-C-7954
Henry Maury Bryant,	CIVIL ACTION NO. 93-C-6874
Clarence Burmon Burgess,	CIVIL ACTION NO. 93-C-6875
Carl Richard Butler,	CIVIL ACTION NO. 93-C-6876
Lewis Edward Campbell,	CIVIL ACTION NO. 93-C-6172
Walter James Campbell,	CIVIL ACTION NO. 93-C-6878
Robert Gehrling Carey,	CIVIL ACITON NO. 93-C-4514
William Burdette Carroll,	CIVIL ACTION NO. 93-C-4906
Harvey Cornelius Carter,	CIVIL ACTION NO. 93-C-6176
James Edward Carter,	CIVIL ACTION NO. 92-C-5727
Rondel Lee Christian,	CIVIL ACTION NO. 93-C-6884
Jackie David Church, Sr.,	CIVIL ACTION NO. 92-C-8017

Ronald Clark,	CIVIL ACTION NO. 93-C-4908
Henry Coleman, Sr.,	CIVIL ACTION NO. 93-C-184
Orrin P. Collins,	CIVIL ACTION NO. 93-C-6889
Oppie Thurman Conley,	CIVIL ACTION NO. 92-C-4091
James Lewis Coss,	CIVIL ACTION NO. 93-C-4027
George Allen Cripple,	CIVIL ACTION NO. 93-C-6183
Clifford Damron,	CIVIL ACTION NO. 93-C-193
Jack Okey Dawson,	CIVIL ACTION NO. 93-C-6898
Robert DeTemple, Sr.,	CIVIL ACTION NO. 93-C-6899
Richard Curtis Decker, Sr.,	CIVIL ACTION NO. 93-C-4519
Charles Denver Dillon,	CIVIL ACTION NO. 93-C-6184
George Edward Dixon,	CIVIL ACTION NO. 92-C-8094
Melvin Arthur Dutcher,	CIVIL ACTION NO. 93-C-6186
Leslie Joe Edelman,	CIVIL ACTION NO. 93-C-4066
Billy Joe Edwards,	CIVIL ACTION NO. 93-C-6902
Robert Franklin Ellenberg,	CIVIL ACTION NO. 93-C-6190
Homer Mont Farley,	CIVIL ACTION NO. 93-C-6191
Harry Warren Ferguson,	CIVIL ACTION NO. 93-C-4077
James Delano Fernihough,	CIVIL ACTION NO. 92-C-4130
Burl Jackson Ferrell,	CIVIL ACTION NO. 93-C-6908
Charles Edward Fletcher,	CIVIL ACTION NO. 93-C-4083
George Forney,	CIVIL ACTION NO. 93-C-6911
Wayne Fortner, Jr.,	CIVIL ACTION NO. 92-C-8150
Garland Stewart Fowler,	CIVIL ACTION NO. 93-C-6912
Bobby Joe Frye,	CIVIL ACTION NO. 93-C-4090
Claude Cecil Gallion,	CIVIL ACTION NO. 93-C-4093
Grant Gilbert, Jr.,	CIVIL ACTION NO. 93-C-4100
Eldon Edward Gillium,	CIVIL ACTION NO. 93-C-6193
William Delford Gragg,	CIVIL ACTION NO. 93-C-6918
Lloyd Dale Gullett,	CIVIL ACTION NO. 92-C-8196
Lester Lee Haas,	CIVIL ACTION NO. 93-C-4122
Richard Arlen Haas,	CIVIL ACTION NO. 93-C-4123
Archie Grey Hall,	CIVIL ACTION NO. 93-C-4125
William Arthur Handley,	CIVIL ACTION NO. 93-C-6922
Woodrow Wilson Haney, Jr.,	CIVIL ACTION NO. 93-C-6923
Dewey Hardin,	CIVIL ACTION NO. 93-C-6924
Farnia Harold Harvey,	CIVIL ACTION NO. 93-C-6926
Clarence Heater,	CIVIL ACTION NO. 93-C-4941
Bottie Archie Holdren,	CIVIL ACTION NO. 93-C-6931

Ralph Veron Holesapple,	CIVIL ACTION NO. 93-C-6201
Herbert Holmes,	CIVIL ACTION NO. 93-C-4944
Carl Elwood Hood,	CIVIL ACTION NO. 93-C-4165
Burgess Horn,	CIVIL ACTION NO. 92-C-8260
Carl Howard,	CIVIL ACTION NO. 93-C-6932
Jessie Howard,	CIVIL ACTION NO. 93-C-4170
Johnnie Hudnall,	CIVIL ACTION NO. 93-C-4174
Robert William Hugus,	CIVIL ACTION NO. 93-C-6205
Russell James,	CIVIL ACTION NO. 92-C-8284
Charles Edward Jarnett,	CIVIL ACTION NO. 93-C-261
Homer Lawrence Jeffers,	CIVIL ACTION NO. 93-C-6206
Ralph O'Jay Jeffrey,	CIVIL ACTION NO. 93-C-4186
Hobert Johnson,	CIVIL ACTION NO. 92-C-4185
Malcolm Earl Johnson, Jr.,	CIVIL ACTION NO. 92-C-4186
Robert Joseph Johnson,	CIVIL ACTION NO. 93-C-6207
Ava Jones, Jr.,	CIVIL ACTION NO. 93-C-4206
William Kenneth Kazee,	CIVIL ACTION NO. 93-C-4215
Steve Kelemen,	CIVIC ACTION NO. 93-C-4219
Arden Clyde Knight,	CIVIL ACTION NO. 93-C-6949
Robert Frank Kotson, Sr.,	CIVIL ACTION NO. 93-C-4228
Donald Caltee Kuhn,	CIVIL ACTION NO. 93-C-4230
Charles Donald Langley,	CIVIL ACTION NO. 93-C-4233
Robert Ray Large,	CIVIL ACTION NO. 93-C-6209
Walter Lavender,	CIVIL ACTION NO. 93-C-4235
John L. Lawhorn,	CIVIL ACTION NO. 93-C-6210
Paul Harrison Leach,	CIVIL ACTION NO. 93-C-4237
Danny Lee Lewis,	CIVIL ACTION NO. 92-C-4215
Edgar Earl Little,	CIVIL ACTION NO. 93-C-1623
Orazio Lucento,	CIVIL ACTION NO. 93-C-6214
Henry Alex Lunsford,	CIVIL ACTION NO. 93-C-4249
Edward Jackson Lynch,	CIVIL ACTION NO. 93-C-4250
Walter J. Mallory,	CIVIL ACTION NO. 93-C-6958
Louis Eugene Martin,	CIVIL ACTION NO. 93-C-6961
Harold Massie,	CIVIL ACTION NO. 93-C-4530
Lynden Bernadine Massie,	CIVIL ACTION NO. 93-C-4263
Billy Ray Matics,	CIVIL ACTION NO. 93-C-6215
Everett Maynard,	CIVIL ACTION NO. 93-C-4960
John Russell McCabe,	CIVIL ACTION NO. 93-C-4270
James Wheeler McConnell,	CIVIL ACTION NO. 93-C-6962

James William McFarland, Sr.,	CIVIL ACTION NO. 69-C-6965
William Edward McGivern,	CIVIL ACTION NO. 93-C-6220
William Joe McNeely,	CIVIL ACTION NO. 93-C-6967
Sterling McPeek,	CIVIL ACTION NO. 93-C-6968
Berman Earl Meadows, Jr.,	CIVIL ACTION NO. 93-C-6223
Harry Robert Meeks,	CIVIL ACTION NO. 93-C-6970
Charles Henry Melvin,	CIVIL ACTION NO. 93-C-6971
Lonnie Burton Mick,	CIVIL ACTION NO. 93-C-4963
Frank Ernest Miller,	CIVIL ACITON NO. 93-C-1639
Ernest Griffith Moore,	CIVIL ACTION NO. 93-C-6972
Ralph Grayden Moore,	CIVIL ACTION NO. 93-C-4297
George Carlton Mosby,	CIVIL ACTION NO. 93-C-4301
Harlo Robert Nance,	CIVIL ACTION NO. 93-C-4313
John Hershel Neace,	CIVIL ACTION NO. 93-C-305
Raymond Allison Nelson,	CIVIL ACTION NO. 93-C-6976
Arnold Adolphus Newhouse,	CIVIL ACTION NO. 93-C-6977
Dewey Gene Newman,	CIVIL ACTION NO. 93-C-4536
Chester James Nibert,	CIVIL ACTION NO. 92-C-8504
Hubert Lee Niswander,	CIVIL ACTION NO. 93-C-6979
James Samuel Parsons,	CIVIL ACTION NO. 93-C-6984
Joseph Pavlovic,	CIVIL ACTION NO. 93-C-6229
Marty Lee Penix,	CIVIL ACTION NO. 93-C-315
James Elwood Perry,	CIVIL ACTION NO. 93-C-4974
James Henry Pyles,	CIVIL ACTION NO. 93-C-6990
Glen Freeman Queen,	CIVIL ACTION NO. 93-C-317
Joe Radcliff,	CIVIL ACTION NO. 93-C-6236
Robert Milton Rayburn,	CIVIL ACTION-NO. 93-C-318
Woodrow Wilson Reed,	CIVIL ACTION NO. 93-C-320
David E. Rhodes,	CIVIL ACTION NO. 93-C-6237
Larry Eugene Riffe,	CIVIL ACTION NO. 93-C-4364
Gail Riggs,	CIVIL ACTION NO. 93-C-6992
Cobern Rigsby, Jr.,	CIVIL ACTION NO. 93-C-4367
Hassil Parker Robinett,	CIVIL ACTION NO. 93-C-4979
Henry Clay Robinson,	CIVIL ACTION NO. 93-C-330
Hollis Virgil Rose,	CIVIL ACTION NO. 93-C-4375
James Rufford Rowe,	CIVIL ACTION NO. 93-C-6242
Kenneth Rowe,	CIVIL ACTION NO. 92-C-8624
William Edward Rowe, Sr.,	CIVIL ACTION NO. 93-C-4379
Harry Cecil Rucker,	CIVIL ACTION NO. 93-C-4982

Kenneth Warren Rumbaugh,	CIVIL ACTION NO. 93-C-4380
Paul Frank Rymer,	CIVIL ACTION NO. 93-C-6997
George Dewey Scott,	CIVIL ACTION NO. 93-C-4387
Leonard N. Sears,	CIVIL ACTION NO. 93-C-6998
David Allen Sevier	CIVIL ACTION NO. 93-C-6999
James Thomas Sheets,	CIVIL ACTION NO. 93-C-4398
Hollis Curl Short,	CIVIL ACTION NO. 92-C-8670
Francis Dean Simpson,	CIVIL ACTION NO. 93-C-7000
John Phillip Simpson,	CIVIL ACTION NO. 93-C-7001
Ronald Eugene Sines,	CIVIL ACTION NO. 93-C-7002
William Eugene Slater,	CIVIL ACTION NO. 93-C-4407
Lester Slawter,	CIVIL ACTION NO. 92-C-470
Claude Junior Smith,	CIVIL ACTION NO. 92-C-8684
Charles Lewis Snyder,	CIVIL ACTION NO. 93-C-4414
James McCoy Spangler,	CIVIL ACTION NO. 93-C-7004
Claude William Stinson,	CIVIL ACTION NO. 93-C-4422
George F. Stock,	CIVIL ACTION NO. 93-C-6252
Marshall Ray Tackett,	CIVIL ACTION NO: 92-C-8747
James Kenneth Taylor,	CIVIL ACTION NO. 93-C-6255
Daniel Wilson Thomas,	CIVIL ACTION NO. 93-C-7018
Walter Martin Thomason,	CIVIL ACTION NO. 93-C-7019
Willard Raymond Todd,	CIVIL ACTION NO. 93-C-6257
John Cecil Towles,	CIVIL ACTION NO. 93-C-7021
Frederick Ray Trusty,	CIVIL ACTION NO. 93-C-4440
James Thomas Turner,	CIVIL ACTION NO. 93-C-5002
Eli Lee Tyo, Jr.,	CIVIL ACTION NO. 93-C-4443
Bennie Franklin Vanhorn,	CIVIL ACTION NO. 93-C-4449
Andrew Douglas Vaughn,	CIVIL ACTION NO. 93-C-385
James Elbert Vaught, Sr.,	CIVIL ACTION NO. 93-C-4450
William Franklin Ward,	CIVIL ACTION NO. 93-C-5003
Roy Emmitt Warren,	CIVIL ACTION NO. 93-C-5005
Albert Richard Waters,	CIVIL ACTION NO. 93-C-6262
Paul Edward Webb,	CIVIL ACTION NO. 93-C-5006
Owen Lawrence Weldon,	CIVIL ACTION NO. 93-C-4470
James Oris Whaley,	CIVIL ACTION NO. 93-C-5012
Harold Emile Willis,	CIVIL ACTION NO. 92-C-8837
George Garland Wilson,	CIVIL ACTION NO. 93-C-2027
Leonard Eugene Wilson,	CIVIL ACTION NO. 92-C-8840
Carl Everett Wimmer,	CIVIL ACTION NO. 93-C-7031

Floyd Ester Woods, CIVIL ACTION NO. 92-C-8859
George Denzil Yolcum, CIVIL ACTION NO: 92-C-4397
Cyril Eugene Yost, CIVIL ACTION NO. 93-C-1733
Plaintiffs,

V.

CSX TRANSPORTATION, INC.
Individually and as successor
to the Chesapeake & Ohio Railroad Company,
Baltimore & Ohio Railroad, Western Maryland Railway,
and the Chessie System
A Virginia Corporation
Serve: A.F. Bobersky
Chafin Bldg, 517 9th Street
Huntington, WV 25701

CONSOLIDATED RAIL CORPORATION (CONRAIL)
As Successor to Penn Central Company, Penn Central
Corporation,
Pennsylvania-New York Central Transportation Company,
and the Pennsylvania Railroad
Serve: CT Corporation
Bank One Center, Suite 1600
Charleston, WV 25301

AMERICAN PREMIER UNDERWRITERS, INC.
NORFOLK AND WESTERN RAILWAY CO.
Individually and as a successor to
the Norfolk Southern Railway Co.,
A Virginia Corporation
Serve: Richard A. Keeney
8th North Jefferson Street
Roanoke, VA 24042
Defendants.

ORIGINAL COMPLAINT AND JURY DEMAND

The plaintiffs, by their undersigned counsel, hereby brings suit against the defendants and for causes of action allege as follows:

1. This is an action for asbestos related personal injuries arising under the provisions of the Federal Employer's Liability Act, 45 U.S.C. Section 51, et seq., specifically including the Federal Safety Appliance Act, 45 U.S.C. Sections 1 through 16, The Locomotive Boiler Inspection Act, 45 U.S.C. Sections 22 through 34 and common law negligence principles.

2. This Court has jurisdiction over this case under 45 U.S.C. Section 51 et seq. and 28 U.S.C. Section 1445 (non-removable actions).

3. The Plaintiffs were employees of the railroad and contacted occupational diseases within the scope of that employment.

4. The amount in controversy, exclusive of interest and costs, exceeds the jurisdictional amount of this Court and this Court has jurisdiction and venue hereof.

5. CSX Transportation, Inc. is a successor to the Chesapeake & Ohio Railroad Company and is a Virginia Corporation. Hereinafter, this defendant is referred to as "the railroad".

6. Consolidated Rail Corporation is a successor to various railroads which employed the plaintiff, including but not limited to, Penn Central Transportation Company, Penn Central Corporation, Pennsylvania-New York Central Transportation Company, the Pennsylvania Railroad and New York Central Railroad.

7. Norfolk and Western Railway Company is a Virginia Corporation and is a wholly owned subsidiary of Norfolk

Southern Railway Company. Hereinafter, this defendant is referred to as "N&W".

All of the allegations contained in Count I are attributable to "the railroad" and are likewise attributable to all the above-referenced defendants.

8. During their employment with the railroad, the Plaintiffs were exposed to asbestos and asbestos-containing products on a repeated basis as well as other harmful dusts. Plaintiffs were required by the railroad to work with and near toxic asbestos and asbestos-containing products and other harmful dusts.

9. The Plaintiffs were unaware of the toxic propensities of the asbestos and asbestos-containing products and other harmful dusts to which they were exposed.

10. As a direct and proximate result of their exposure asbestos and asbestos-containing products and other harmfi dusts, without any lack of due rare on his part, the Plaintiff contracted asbestosis and other dust diseases related to such exposure.

11. The Plaintiffs were unaware of the cause of their latent and deteriorating medical condition until diagnosed as suffering from same within the last two (2) years.

12. The railroad owed the Plaintiffs a duty to have them work in a safe employment environment under the Federal Employer's Liability Act.

13. The railroad, by and through its duly authorized agents, breached this duty to the plaintiffs by:

(a) Failing to provide the Plaintiffs with a reasonably safe work place;

(b) Failing to furnish the Plaintiffs with safe and suitable tools and equipment including adequate protective masks and protective inhalation devices;

(c) Failing to warn the Plaintiffs of the true nature and hazardous efforts of asbestos and asbestos-containing products;

(d) Failing to operate a locomotive repair facility in a reasonably safe manner;

(e) Failing to provide instructions or a method for the safe use of asbestos;

(f) Failing to provide adequate, if any, instructions in the use or removal of old asbestos products;

(g) Failing to test asbestos-containing products prior to requiring employees to work with the same, to determine their ultra-hazardous nature;

(h) Formulating and using a method of handling asbestos and asbestos-containing products which exposed the Plaintiffs to high concentrations of asbestos fibers;

(i) Failing to provide the Plaintiffs with safe and proper ventilation systems in the railroad facilities;

(j) Allowing unsafe practices to become standard practice;

(k) Failing to exercise reasonable care in publishing and enforcing a safety plan and method of handling and installing asvestos and asbestos-containing products;

(l) Failing to inquire of the suppliers of asbestos and asbestos-containing products, the nature of asbestos;

(m) Requiring the Plaintiffs to work with ultra-hazardous asbestos and asbestos-containing products;

(n) Failing to exercise adequate, if any, care for the health and safety of the Plaintiffs;

(o) Failing to periodically test and examine the Plaintiffs to determine if they were subject to any ill

effects of their exposure to asbestos and asbestos-containing products; and

(p) Failing to periodically inspect its locomotives, boilers and their appurtenances in order to ascertain any contamination by asbestos fibers.

14. As a direct and proximate result of the breach of duty by the railroad, the Plaintiffs was exposed to toxic asbestos and asbestos-containing products and other harmful dusts.

15. As a direct and proximate result of the negligence of the railroad, the Plaintiffs have suffered personal injury, great pain, extreme anxiety, and they truly believe their injuries and disabilities are permanent; their earning capacity has been greatly reduced; their enjoyment of life has been greatly diminished; and their expected life span has been greatly shortened.

16. As a direct and proximate result of the negligence of the railroad, the Plaintiffs, because of health problems caused by this negligence, has [sic] been forced to incur medical expenses for doctors, hospitals, drugs and health care services, and they truly believe that they will be forced to incur additional expenses in the future in an effort to treat their condition.

17. The Plaintiffs were strong, able-bodied workman [sic] capable of gainful employment at the time of the manifestation of their illness. As a result of their illness, the Plaintiffs have suffered damages by way of lost wages and a diminished ability to render services, society, affection, counseling and support to his household [sic].

WHEREFORE, the Plaintiffs claims [sic] compensatory damages in the amount deemed sufficient by the jury with interest and costs of suit herein.

JURY DEMAND

The plaintiffs demand a trial by jury on all issues presented herein.

Plaintiffs
By Counsel

/s/ [illegible]
JAMES F. HUMPHREYS
Bank One Center, Suite 1113
707 Virginia Street East
Charleston, WV 25301
(304) 343-4185

Ness, Motley, Loadholt,
Richardson & Poole

By: /s/ [illegible]
JAMES H. RION, JR.
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
RALPH BAILEY,	CIVIL ACTION NO. 92-C-8979
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

NORFOLK AND WESTERN RAILWAY COMPANY'S
MOTION *IN LIMINE* TO EXCLUDE CANCER EVIDENCE

NOW COMES the Defendant, Norfolk and Western Railway Company ("defendant" or "N&W") by counsel, Fred Adkins and Rodney L. Baker II, and pursuant to Rule 103(c) and 403 of the West Virginia Rules of Evidence and moves this Court *in limine* to exclude all evidence referring to cancer at the trial of the above-referenced civil action. As support for its Motion, defendant state as follows:

1. That no plaintiff allegedly suffers from any form of cancer, they merely allege asbestos related disease, or mixed dust pneumoconiosis;

2. That asbestosis, asbestos related pleural disease, and mixed dust pneumoconiosis alone do not necessarily result in an increased risk of cancer;

3. That evidence of Plaintiffs' "fear of cancer", or any mention of cancer is irrelevant;

4. That the introduction of cancer evidence would inflame the jury and invite consideration by the jury of a terminal illness when there is no evidence whatsoever to support such a proposition;

5. That extreme prejudice will flow to defendant if cancer evidence is admitted at the trial of this action; and

6. That all cancer evidence should be excluded from the trial of the claims of these plaintiffs under Rule 403 of the West Virginia Rules of Evidence.

In further support of defendant's position, defendant hereby incorporates by reference its contemporaneously fled Memorandum in Support of this Motion *In Limine* in the above-captioned action.

WHEREFORE, for all of the above reasons, defendant respectfully requests that its Motion *In Limine* be granted.

NORFOLK AND WESTERN RAILWAY CO.

By /s/ Rodney Baker, II
Of Counsel

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
RALPH BAILEY,	CIVIL ACTION NO. 92-C-8979
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, NORFOLK AND WESTERN RAILWAY COMPANY'S, MOTION *IN LIMINE* TO EXCLUDE CANCER EVIDENCE

Norfolk and Western Railway Company, ("defendant" or "N&W"), by counsel, hereby moves this Court for an Order excluding evidence of plaintiffs' alleged asbestos exposure and the development of cancer, the alleged increased risk of developing cancer, the fear of cancer, or any other mention of the alleged relationship between asbestos exposure and cancer. The grounds for this Motion include: (1) the claims of plaintiffs' are predicated upon an allegation of asbestosis, asbestos related pleural disease, or mixed dust pneumoconiosis; (2) no plaintiff alleges that he now has cancer; (3) evidence concerning cancer is irrelevant to the issues of this case; and (4) the admission of evidence regarding cancer would result in extreme prejudice to defendant.

STATEMENT OF FACTS

Plaintiffs filed with this Court Complaints alleging, *inter alia*, that they had suffered a severe injury to their bodies and respiratory systems as a result of exposure to irritants while in the employ of Defendant, Norfolk and Western Railway Company. The Complaints sought to establish causes of action under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et. seq.* (FELA)[1] against the Defendant. In the Complaints, plaintiffs maintain that Defendant violated various duties allegedly owed to them by failing, among other things, to provide them with a reasonably safe place within which to work. *See*, Complaints. As a result of these alleged breaches of duty, the plaintiffs maintain that they were exposed to hazardous substances which caused severe and permanent injury to their persons. *See* Complaints.

ARGUMENT

Plaintiffs' do not present an "actionable injury" which would allow the introduction of cancer evidence. As such, the evidence is irrelevant to the instant action. Moreover, the evidence should not be admitted on the issue of liability because the extreme prejudice which would flow to the defendants is substantially outweighed by its probative value.

[1] Under FELA, a railroad has a duty to provide its employees with a reasonably safe place to work. This duty, however, is not absolute and a railroad is not deemed an insurer of its employees' safety. *Inman v. Baltimore and O.R. Co.*, 361 U.S. 138 (1960); *Atlantic Coast Line R. Co. v. Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952. A railroad's duty to warn is limited to those perils which may be reasonably anticipated. A railroad is held to the standard of care of a reasonably prudent person. *Fowler v. Gulf, M. and 0. R. Co.*, 286 S.W.2d 404 (Mo.App. 1956).

A. EVIDENCE THAT PLAINTIFFS MAY HAVE AN INCREASED RISK OF CONTRACTING CANCER SHOULD BE EXCLUDED.

Indeed, cancer evidence may be introduced in a non-cancer case to establish damages in connection with cancer which will *probably* develop in the future. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1321 (5th Cir. 1985) (*Jackson* II). However, as the Third Circuit Court of Appeals has held, the damages of which the cancer evidence would be probative must be available to the plaintiff as a matter of law. *Id.* The *Jackson* Court expounded:

> Whether these damages are available in the instant case may depend on the nature of the actionable injury. If the actionable injury here was the exposure to asbestos, as Jackson insists, he may be entitled to recover damages for those future consequences, such as the manifestation of cancer, that could be established in terms of reasonable probabilities and for the mental suffering that is the direct consequence of the increased risk of cancer caused by the asbestos exposure. If, on the other hand, exposure to asbestos is regarded as too abstract an invasion, either as a general rule or in the context of latent disease, mass tort litigation, and instead Jackson's asbestosis itself is considered to be the only actionable harm, Jackson may have no right to recover these damages since asbestosis alone does not result in an increased risk of cancer.

Id. at 1322. Simply stated, as the *Jackson* Court recognized, the question turns on a matter of probabilities.

Unlike some states' definition, a plaintiff's "actionable injury" in a FELA action is that injury which is *manifest. See* 45 U.S.C. § 51. Section 51 provides, in part, that "every common carrier by railroad . . . shall be liable in damages to any person suffering *injury* while he is employed by such

carrier . . . for such *injury* . . . resulting in whole or in part from the negligence of any . . . such carrier . . . ." (emphasis added). Moreover, for statute of limitations purposes in a FELA action, "the afflicted employee can be held to be 'injured' *only when the accumulated effects of the deleterious substance manifest themselves. . . .*" *Urie v. Thompson*, 337 U.S. 163, 170 (1949)(citations omitted) (emphasis added).

Recall, Plaintiffs allege asbestosis, asbestos related pleural disease, or mixed dust pneumoconiosis. The Third Circuit Court of Appeals has held, as a matter of federal law, that a FELA action for an asbestos-related injury does not exist before manifestation of an injury. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3rd Cir. 1985), *cert. denied* ___ U.S. ___, 106 S.Ct. 183. The court explained:

> If mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in Federal court. *It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered.*

Id. (emphasis added).

As the *Schweitzer* Court recognizes, sound public policy dictates that a plaintiffs injury must be defined in concrete terms. To allow a plaintiff recovery for cancer-related damages prematurely, would result in over-compensation if a plaintiff never contracts cancer. To like effect, if a plaintiff later develops cancer, the compensation paid earlier may well be inadequate. In other words, limiting the type of damages

which a plaintiff may recover in a FELA asbestos action ensures that adequate and just compensation is available for all railroad workers who allegedly have asbestos-related injuries.

Under the FELA, mere exposure to asbestos is clearly not an actionable injury. Instead, a plaintiff has an actionable injury when he can present an apparent physical injury. In the present case, plaintiffs' only allegation of an asbestos-related physical injury is that they have asbestosis, asbestos related pleural disease and\or mixed dust pneumoconiosis. Plaintiffs can offer no evidence that their alleged conditions will likely result in a cancerous condition, and any evidence of an increased risk of cancer is inherently speculative in nature. Accordingly, Plaintiffs have no right to recover damages for cancer which may develop in the future or for mental anguish based on an increased risk of cancer. Because Plaintiffs cannot recover the damages of which the cancer evidence would be probative, the cancer evidence itself is irrelevant and thus, should be excluded.

Asbestosis and cancer are distinct diseases. The only relationship between the two is that both can be precipitated by exposure to asbestos. Evidence of an increased risk of cancer is, thus, surmise. The law is well-settled that future damages are recoverable only if there is a reasonable certainty that future damages will result. *Shelton v. Thompson*, 148 F.2d 1 (7th Cir. 1945). To introduce evidence of the relationship between asbestos exposure and cancer, a plaintiff must, therefore, show to a reasonable degree of medical certainty that a plaintiff has cancer or will contract cancer as a result of his exposure to asbestos. *Id.*

Other West Virginia Circuit Courts have excluded similar evidence because of its speculative nature. For instance, as the Honorable Robert A. Burnside of the Raleigh County Circuit Court held, "I think your motion [*in limine* to exclude evidence of Plaintiff's increased risk of cancer] is granted. Its

speculative. Now I don't know if the doctor's said there's a 54 percent chance; the greater chance statistically, then we have another problem. Fortunately or unfortunately, however, you look at it, that isn't before us. Apparently, all we're going to have is two doctors saying there is a statistical link between this thing and cancer somewhere in the future." *Tr. R.* at 19, *Harvey v. CSX Transportation, Inc.*, Civil Action No. 93-C-1224-B (Raleigh Co. Cir. Ct. W.Va. 1995), relevant portions attached hereto as *Exhibit A*. Simply stated, as the circuit court recognizes, an action for an increased risk of contracting cancer is a "speculative claim to a future injury." *Id.* at 21. "What is absent here is a present injury or evidence of a metabolic or a somatic change that, aside from statistics, can be seen physically to be a precursor to a further condition." *Id.* at 98.

B. EVIDENCE OF PLAINTIFFS' FEAR OF CANCER SHOULD BE EXCLUDED.

Defendants anticipate that plaintiffs will assert that they are entitled to introduce evidence of their fear of contracting cancer. In actuality, plaintiffs seek compensation for a wholly mental injury. In this case, there is no evidence that plaintiffs have suffered any physical harm from alleged mental anguish based on fear of contracting cancer in the future. There is nothing in the plaintiffs' depositions, any of the medical records, or plaintiffs' witness lists to indicate that plaintiffs have suffered physical harm from their alleged mental anguish based on fear of contracting cancer. *See Excerpt of Deposition Transcript* of F. Ayers at Pg. 113, attached hereto as *Exhibit B*, D. Johnson at Pgs. 69-70, attached hereto as *Exhibit C*, J. Spangler at Pgs. 153-154, attached hereto as *Exhibit D*, R. Bailey at Pg. 70, attached hereto as *Exhibit E*, C. Vance at Pgs. 75-76[2], attached hereto as *Exhibit F*, J.

[2] As reflected by Mr. Vance's deposition testimony, he mistakenly believes that he has asbestos induced cancer. However, nothing in his

Shirley at Pgs. 102-109, attached hereto as *Exhibit G*[3], C. Butler at Pgs. 107-108, attached hereto as *Exhibit H*. No plaintiff has sought medical or psychological treatment for an alleged fear of cancer. The threat of future harm, not yet realized, is not enough to support the introduction of fear of cancer evidence. Consequently, the evidence should be excluded.

A recent Second Circuit Opinion delineates the circumstances under which a fear of cancer-claim is viable. The plaintiff in *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197, 1202 (2nd Cir. 1994), unlike the plaintiffs in the case at bar, alleged a claim for negligent infliction of emotional distress. Accordingly, the court applied the "zone of danger" test as delineated in *Consolidated Rail Corp. v. Gottshall*, ___ U.S. ____, 114 S.Ct. 2396 (1994).[4] As the *Marchica* Court

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medical records supports his erroneous belief. Mr. Vance admitted at page 67 of his deposition that no doctor has ever diagnosed him with cancer. Irrespective of his belief, Mr. Vance offered no testimony that he has experienced any form of physical manifestation of an alleged fear of cancer. Similarly, Mr. Vance has not sought treatment or counseling for his alleged fear of cancer.

[3] Mr. Shirley professes to have a fear of cancer despite having no information that asbestos exposure can be casually related to cancer. Mr. Shirley admits that he is a worry wart, that he has never thrown up as a result of his alleged "fear of cancer", and that he has never sought treatment or counseling for his "alleged fear of cancer".

[4] In *Gottshall*, the Court adopted a very narrow view of claims for negligent infliction of emotional distress holding that this cause of action did not encompass claims for workplace related stress and harassment. *Id.* at 2409. Imposing a duty to avoid a stressful work environment would "make railroads the insurers of the emotional well being and mental health of their employees." *Id.* at 2409. Unwilling to take this radical step, the Court stated with clarity that FELA is "not an insurance statute." *Id.* The *Gottshall* court adopted the common law "zone of danger" test delimiting the proper scope of an employer's duty under FELA for claims of negligent infliction of emotional distress. Those claims, the court stated, are reserved to those cases where severe emotional distress occurs as a

explained, in fear-of-developing-disease cases "the exposure requirement—plus *actual likelihood* of developing the disease—. . . is a means of ensuring the genuineness of the claim." *Marchica*, 31 F.3d at 1205. In other words, "mental anxiety is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent . . . and a likelihood of contracting the disease as a result. *Doner v. Adams Contracting Inc.*, 617 N.Y.S. 2d 565, 566 (A.D. 3 Dep't 1994). The plaintiff in *Marchica* sustained a puncture wound from a discarded hypodermic needle. The court found that because the plaintiff suffered a physical impact he was entitled to receive compensation for his emotional injuries. Moreover, the court noted that the plaintiff, unlike the current plaintiffs, had physical manifestations of his emotional distress such as post traumatic stress disorder, accompanied by sleeplessness, weight loss, and vomiting which was indicia of the genuiness of his emotional distress claim.

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result of an impact or threat of physical impact where the plaintiff was within the "zone of danger." As the Circuit Court of Appeals for the District of Columbia emphasized, the emotional injuries presented by a FELA plaintiff must be "serious and verifiable." *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 433 (D.C. App. 1994).

The "zone of danger" test further limits recovery for emotional injury to "those plaintiffs who sustain a physical impact as a result of a defendant's conduct, or who are placed in immediate risk of physical harm by that conduct." *Gottshall*, 114 S.Ct. at 2406 (emphasis added). Physical impact under the "zone of danger" test announced in *Gottshall* contemplates an impact relating to the resulting emotional distress. *Accord Bloom v. Consolidated Rail Corp.*, 41 F.3d 911 (3rd Cir. 1994) (holding that engineer did not sustain a physical impact when the locomotive engine struck a pedestrian); *Grube v. Pacifrc R. Co.*, 886 P.2d 845, 852 (Kan.1994)(holding that engineer did not sustain a physical impact when he was thrown against the console of the locomotive engine). Where a plaintiff can not [sic] demonstrate that he suffered a physical impact, he must show that the threat of physical impact is more than "minimal or negligible." *McMillan*, 648 A.2d at 434.

The Second Circuit Court of Appeals recent [sic] held that a railroad worker may recover for his fear of contracting an asbestos-related disease based solely on his exposure to asbestos where the worker had contracted an asbestos-related disease or exhibited any symptoms of an asbestos related disease. *Buckley v. Metro-North Commuter Railroad*, No. 95-7399, 1996 U.S. App. LEXIS 6096 (2nd Cir. 1996). On appeal, the United States Supreme Court of Appeals reversed the Second Circuit's decision finding that the "physical impact" required for recovery of damages for negligent infliction of emotional distress did not include "a contact that amounts to no more than an exposure—an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time." *Metro-North Commuter R.R. Co. v. Buckley* 117 S.Ct 2113, 2118 (1997). Relying on the Supreme Court's decision in *Buckley*, the Superior Court of Chatham County, Georgia, held that a plaintiff may not recover for emotional distress arising from fear of cancer until plaintiff begins to manifest symptoms of cancer. *See* Order attached hereto as *Exhibit I*. Plaintiffs in the case at bar can not offer objective proof to establish that they suffered an emotional injury. To the contrary, as previously noted, plaintiffs do not exhibit physical manifestations of an alleged fear of contracting cancer.

Unquestionably, the "zone of danger" standard does not allow recovery for all alleged emotional distress and as such plaintiffs should be precluded in the instant matter from introducing any cancer evidence.

C. CANCER EVIDENCE SHOULD NOT BE ADMITTED ON THE ISSUE OF THE RAILROAD'S LIABILITY BECAUSE THE PROBATIVE VALUE OF THE EVIDENCE IS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

As previously noted, plaintiffs have no right under FELA to recover future damages for cancer or damages for mental anguish based on an increased risk of cancer. The cancer evidence, therefore, is irrelevant and inadmissible under Rule 402. If this Court finds, however, that the cancer evidence is admissible on the issue of the Railroad's liability, the evidence should be excluded under Rule 403 of the West Virginia Rules of Evidence.

As the Supreme Court of Appeals of West Virginia directed in *Voelker v. The Frederick Business Properties Company*, 465 S.E.2d 246 (W.Va. 1995), West Virginia Rules of Evidence 401, 402,[5] and 403 "are to be read together and are not to be applied in isolation." Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." The term "unfair prejudice", as used in Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly . . . *an emotional one*." W.V.R.E. 403 advisory committee's note. Of course, the mere fact that evidence is prejudicial

[5] Rule 402 states that "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of West Virginia, by these rules, or other rules adopted by the Supreme Court of Appeals." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

does not, by itself, require its exclusion. Rather, the court must determine whether the prejudice is substantially outweighed by the probative value of the evidence. In making this determination, the court should consider the probable effectiveness of a limiting instruction. See W.V.R.E. 403 advisory committee's note.

The rules of relevancy, 401, 402, and 403, dictate against the admission of cancer evidence in the instant case for several reasons. First, plaintiffs do not have cancer. Thus, the evidence should be excluded because it is irrelevant. Further, a limiting instruction on the proper consideration of the cancer evidence will be ineffective because the mention of "cancer" evokes a strong response in all of us. In other words, the jury will consider the cancer evidence in ascertaining plaintiffs' damages and compensate them for injuries they do not have and more likely than not will never incur. The jury should not deliberate on a possibility that has no medical basis. Clearly, a mere possibility does not meet the reasonable degree of medical certainty standard.

WHEREFORE, for the foregoing reasons and for such other reasons as may appear to this Court, Defendant respectfully requests that its Motion *In Limine* To Exclude Cancer Evidence be granted.

NORFOLK AND WESTERN RAILWAY CO.

By /s/ Rodney Baker, II
Of Counsel

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
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FREEMAN AYERS,
DOYLE JOHNSON,
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Plaintiffs,

vs. Civil Action No. 93-C-6857
92-C-8979
93-C-6876
92-C-8970
93-C-7004
92-C-5829

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation,

Defendant.

TRIAL TRANSCRIPT
April 14, 1998

* * * *

[155] want to—

MR. RION: We oppose it.

THE COURT: Oppose it, okay. Well, let's go ahead and talk about this in order, then. Why don't you just summarize this issue of other cases and settlements?

My inclination is to believe, based on what my research has been, is that that's largely a question of discretion.

My habit in the past has been to be completely silent with respect to those issues of settlement unless there's an agreement between counsel to the contrary.

MR. BOITER: Essentially, there are several cases, the *Gauldin* case, which is a Supreme Court case out of Kansas. It's a Kansas Supreme Court case, it's not a federal case and FELA is federal law.

A St. Louis, Southwestern Railroad case is out of the District Court, Kansas, and in the United States District Court out of Kentucky.

All of those cases are saying the same thing, which is if FELA makes no provision for the reduction of damages recoverable by an employee against the railroad. And what it says is the railroad can go out, if they [156] think someone else was a contributing factor, they can go out and sue them all day long, but the damages for a Plaintiff, when they sue the railroad, is not recoverable; and it sort of comes off the *Rogers* case where it says that the railroad is responsible if their negligence contributes to the injury in whole or in part, they [sic] responsible for the entire injury. And because it's a creature of federal law the federal law and the federal courts have ruled there is no provision in FELA for the reduction of damages, or whoever is going to go out and sue the other person, so it had no relevance to these proceedings.

MR. BAKER: Your Honor, I think this goes back to what we started on yesterday, the misinterpretation—the deliberate misinterpretation of the *Rogers* case. The *Rogers* case stands for the proposition that a FELA plaintiff's burden to get his case before the jury is to show negligence, however slight, on the part of the railroad.

It does not speak to damages, who is responsible for payment of the damages.

I have a United States District Court case decided of January 24, 1997. It's *Barrow Smith versus* [157] *New Jersey Transit Rail Operations* that discusses a portion of damages in FELA cases.

It says the railroad's only responsible for the—I'm sorry, this case may not particularly say the railroad's only responsible for the portion of damages it caused. *Dell versus Baltimore and Lionel Railroad Company*, a Supreme Court of Pennsylvania case decided January 24, 1989; in that case it says that the railroad is only responsible for the damages it causes.

If the jury in these cases finds that the Plaintiff's alleged injury breathing impairment is 90 percent caused by Plaintiff's smoking, 50 percent caused by Plaintiff's smoking, 40 percent caused by the manufacturer or any other parties the Plaintiff has sued, and 10 percent caused by the railroad, the railroad is only liable for that 10 percent.

Now, I would be happy to let you look at copies of either the *Barrow Smith* or *Dell versus Baltimore*, an Ohio case. I will get you copies of those if you would like.

THE COURT: How do you—how do you propose to allocate fault in this case between N&W and the manufacturers?

[158] MR. BAKER: Well, Your Honor, I think the jury's entitled to know, via introduction of the—possible introduction of the Complaints filed against the manufacturers, that each of these Plaintiffs has made claims against other parties for the exact same injury they're claiming in this one.

THE COURT: Now, wait a minute. You're not saying that you're going to ask the jury to apportion fault or that you're going to put any evidence in in support of that proposition. So it's a red herring, isn't it?

MR. BAKER: No, Your Honor. We will ask the jury to apportion fault.

THE COURT: Based on what, that was my question?

MR. BAKER: Well, Your Honor, one, it's going to be all the Plaintiffs except one in these cases smoked cigarettes.

THE COURT: It doesn't have anything to do with the settlement.

MR. BAKER: Okay. But as far as apportioning fault regarding the settlements, unless you let the jury know that these Plaintiffs have made claims [159] against other parties for the exact injuries they're claiming now, not the amounts of the settlements. If you wish to set off the settlements and never advise the jury that there has been settlements against the other parties that is in your discretion, but the fact—I think the jury is given—the jury has to be informed in some way that there has been other cases filed and—

THE COURT: In aide of what?

MR. BAKER: In aide of their apportionment of damages in these cases.

THE COURT: Well, wait a minute. The only thing that I understood you said you were going to have them apportion is the Plaintiffs relative fault. Are you going to put on evidence about Pittsburgh Corning?

MR. BAKER: I'm not going to put on evidence that Pittsburgh Corning—

THE COURT: Well, what are they going to apportion with? What are they going to use to proportion?

MR. BAKER: I think we will put on evidence that the manufacturers were, in general terms, I can't speak to the specifics of this, you know, it will depend on how the evidence comes in at trial, but there may [160] well be evidence that the manufacturers knew more than they have told and, therefore, the railroad's conduct was permissible given the knowledge that it had.

THE COURT: Well, you can't just say we can't give this jury a verdict that says N&W Plaintiffs and manufacturers, can you?

MR. BAKER: My view—and there will be other factors, Your Honor.

MR. ADKINS: Judge, I just—

THE COURT: You've got to tell me exactly what evidence you're going to put on that we could entrust this jury with to allocate relative fault between Norfolk and Western and the manufacturers, now.

MR. ADKINS: I think we're confusing two things here. First of all, I think you are right. If we are going to try to say, from a fault standpoint, that we need evidence, and I think we will have evidence, some evidence at least, of manufacturers in generally, not specifically evidence, as to what the manufacturers know or what they should've done, et cetera, et cetera.

The second issue, though, is the apportionment of the damages. Certainly, if the doctors testify, and [161] they will in this case, that Dr. Gaziano, Dr. Renn, all of them, there's no dispute on this, that cigarette smoking causes problems, there's no dispute that many of these men have problems related to their cigarette smoking.

Now, what we were proposing in the jury form is that when you get to the part of apportioning the damage of this that, for example, using 100 as a number, and the jury would say that 40 of that is railroad and 60 is smoking, we're only responsible for 40 percent; and that's just common sense and logic.

I mean, certainly the railroad would not be responsible for injury caused by someone's fault anymore than it would be caused by someone shot himself in the hand, you know.

THE COURT: Although—and this is an entirely separate issue, but unless I'm mistaken you're going to have a witness that says that the specific Plaintiffs are suffering from smokers disease—

MR. ADKINS: Emphysema.

THE COURT: —and the Plaintiffs are going to have witnesses who are going to say that they're suffering from asbestosis—

[162] MR. ADKINS: —and emphysema.

THE COURT: Okay. That's my point.

MR. ADKINS: Now, I agree, if there's a dispute there, but there's going to be a dispute as to degree, I mean —

THE COURT: That doesn't have anything to do with—

MR. ADKINS: I understand, Your Honor. So the apportionment, clearly we're not responsible. I mean, that can't, I mean, that can't be the law and it's not the law that the railroad is responsible for someone smoking.

THE COURT: No, correct.

MR. ADKINS: So if the doctor testifies that all of his disease process is caused by smoking, another doctor testifies that none of it, then the jury is going to have to decide. Now, if they want to decide part—

THE COURT: None of this in anyway relates to this question of fault.

MR. ADKINS: I agree.

THE COURT: Other cases have shown this.

MR. ADKINS: Well, you're right. The only [163] thing I wanted to do on the other cases and settlement is, I think in terms of the jury understanding and knowing what's going on, that, and I understand the Court can make sure that someone doesn't recover twice for the same thing, so we're entitled to a setoff. But I think in order for the jury to understand and properly evaluate these cases they need to know that there are other cases pending by these same individuals for the same disease process.

We do this all the time in these cases we have; where we ask them. We did it in the discovery depositions that we did of these individuals, that they were part of Mon Mass II or III, whatever the number was up there. And that's all we're going to ask them.

We are going to ask them if they got—well, in the deposition we did ask them that they—if they got compensation and the answer was I don't remember or I don't know, or I don't know how much. But I don't intend to get into that part of it. Only to ask them if they have a lawsuit pending or if it's been dismissed, why, for the same—

THE COURT: Why?

MR. ADKINS: Why? So the jury understands [164] what's going on with these Plaintiffs. It's part of why you ask any of these questions, I guess.

You know, for the jury it's relative information about what the Plaintiffs have done. It might be relevant on the statute of limitations as to why they filed the suit up there.

THE COURT: Why?

MR. ADKINS: Well, because as to when they knew or should've known that they had a disease process. I don't know when that case was filed in relation to the statute, so until we hear their answer we don't know.

THE COURT: It still doesn't have anything to do with whether they made claims against somebody else.

MR. ADKINS: I think all these cases were filed first down here.

MR. RION: All these cases were filed first down here.

MR. ADKINS: Well, whatever, but the point is I ought to be able to inquire about it is all I'm saying, Judge. I don't know what their answers are.

THE COURT: I'm going to grant the [165] Plaintiffs motion. I think it's complete rhetoric.

How about this issue of come back for cancer?

Let me just—this is a pure seat of pants, but the one case we've got is the Bethany College case and my understanding from it would be that if an additional disease manifests itself after there's been a recovery by settlement or verdict that you're stuck in West Virginia. We're a one cause of action state and it's not been specifically addressed. And the question is do we—is that something we decided here today?

MR. RION: That's really my point is that it's not right, Judge. There's no clear guidance and it's not really in a posture where it can and should be decided, so—I mean, I'd like from an advocate standpoint, to be able to stand-up say, this is our last chance. This is all we get.

I'm sure Fred would like to say, oh, they can come back if they get cancer. In a way he'd like to say that, but on the other hand you've got the impact passed [sic] this case, and in some instances the client may not want him to say it because he'd be stuck with it and everything.

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[232] with occupational disease under FELA, later also brought those type of claims under recovery to the Boiler Inspection Act in limited circumstances.

THE COURT: I'll read your memoranda. If I need anything else I'll let you know.

MR. BAKER: Okay.

MR. RION: On the other things we've got here, I think, I can't remember if you ruled on the other.

THE COURT: I will. Are there any other issues that the Plaintiffs want to take up now that we've got some time that are not just related to opening statements?

MR. RION: I think our motions in limine cover everything that we want to cover. I guess that one other point that was raised in the argument that I don't think is—that you're not going to really need to decide, excuse me, until the instruction phase that I can introduce now, and that's simply that we disagree with Mr. Adkins' contention that, Number One, that smoking is contributory fault in these cases; and, Number Two, that the *Rogers* case stands for anything other than the proposition that the FELA causation [233] standard is does the railroad's negligence contribute, however slightly, to the injury, and I don't think I need to argue that.

You have the case, Your Honor. If you would just read it I don't think there would be any question in your mind whatever. Once you read it the question—the debate is does it apply to how much negligence or how much cause; and Mr. Adkins says it's how much negligence and I say it's how much cause, and Your Honor can read the case and make that decision.

I think the form jury instruction, pattern jury instruction in FELA cases says the railroad's responsible if it's negligence contributes, however slightly, to an employee's injury.

THE COURT: Mr. Boiter, you snagged my copy of *Rogers*.

MR. ADKINS: Judge, read *Dale versus B&O*, which is a Supreme Court of Pennsylvania case. It's an asbestos case. It's this very issue—it was denied to the U.S. Supreme Court on this issue. It deals with smoking and the fact that the railway is not responsible for any disease process other than what was caused by asbestos related exposure. It's not a—

[234] THE COURT: *Dale*?

MR. ADKINS: *Dale versus B&O*, and I think we have a copy of it here we can give to you.

MR. BAKER: I'll go make you a copy right now if you'd like.

MR. RION: And I agree with—

THE COURT: Do you know if it's just attached to your stuff?

MR. BAKER: I didn't—we haven't filed a motion on this. That's a copy of *Zarrow Smith versus New Jersey Transit Rail*. It talks about—

THE COURT: Is it *Dale*?

MR. RION: I agree they properly represent what *Dale* says. I just think it's an aberration and it is in conflict with the *Rogers* case, and there are a number, I believe, Mr. Boiter you cited a case that says smoking is not contributory fault in a pneumoconiosis case, didn't you?

MR. BOITER: The *Farmer* case.

MR. RION: Yes, and it comes back to the general concept, Judge, I think it's proper for them to show it, but it's, although this is not a Texas case, this issue came up in front of Judge Parker in the [235] *Salino* case, is smoking contributory fault in an asbestos case? And his ruling was that it can be and I agree that it can be under certain circumstances.

Number One, you've got to show that smoking caused the injury in question, and that would apply, obviously, in a lung cancer case most clearly. So, the one point that we have is smoking doesn't cause asbestosis.

Second, you've got to prove that the Plaintiff was careless in his smoking with regards to asbestos, so you've got to show some level of knowledge of the Plaintiff about the synergistic effect, and that was—we can get you Judge Parker's instruction.

Jane, can you call the office and get Judge Parker's jury instruction on contributory fault of smoking? We think in the absence, and I don't think there's any here in the absence, of some kind of proof about the synergistic effect.

It's, you know, in a way some other trial Judges in other jurisdictions, Judge, you can almost analogize to, if I get in an automobile wreck—this is the most extreme example, but it sort of makes a point. If I'm an alcoholic and have a bad liver and I [236] get in an automobile wreck and have trauma to my abdomen, the fact that I'm careless in drinking is really not contributory fault with regard to that accident. Unless I was drinking when I was driving.

But if I'm a former alcoholic with a damaged liver who gets stomach trauma, the fact that I was careless in drinking is carelessness, but it's not contributory fault with regard to an accident.

The same thing concept. Of course, it can go both ways. I mean, the decisions that I've seen in cases I've tried have been all over the board. Judge Watt, for example, permitted it in lung cancer cases, but not in asbestosis cases.

Other Judges have—there have been some Judges won't even permit it in a lung cancer case. Then you've got Judge Parker's view is a little bit more in the middle of the road. He permits it, but it has a different—

THE COURT: I ruled on, but it's been forever since I've done it because we've tried damage cases. I can't remember how I dealt with it, except that—

MR. ADKINS: I understand that FELA is a [237] little different, Judge, but I can't believe that anybody—that the law would even consider a concept that says that if you can prove that something, some damage was not caused by a particular Defendant, that that Defendant is responsible for that. I mean, if that's what the law is.

THE COURT: No, no, no. Oh, no, but that may be an on and off switch.It may be a jury's responsibility to determine between competing experts whether the man has asbestosis, which might be aggravated by the smoking, or smokers disease.

If it's smokers disease you're not responsible.

MR. ADKINS: That's not what they're arguing, Judge. They're saying that only if it's a smoking disease and asbestos—

THE COURT: No, I think what they're arguing is that it's not a place for comparative fault if it is a sole proximate cause. It's a different story all together.

MR. ADKINS: Okay, if I understand what you're saying is, the damage aspect of it, the jury could apportion that. For example, if—and I don't [238] know how you would do this, but that's the problem.

If it's—say it's 50/50 and the jury says, you know, it's $100.00. Now, as I understand, if the total damage is $100.00, then we're only responsible for $50.00 of it. See, is that what you're saying?

THF COURT: Well, 50/50 you don't pay anything.

MR. ADKINS: Well, no, Judge, this is FELA again.

MR. RION: Okay, it's pure comparative. My view would be, Judge, that the smoking—

THE COURT: Let me interrupt just a second and see if you can—both sides can kind of respond to what my perspective is on this.

I think it's going to depend entirely on what the doctors say about each individual Plaintiff, but let's take the extreme set of circumstances. Gaziano says that he's got asbestosis and the—your doctor says he's got smoker's disease.

There's no way, under those circumstances, a jury can come up with a 50/50 split. That's allowing them to just compromise the verdict because they've got conflicting evidence.

[239] Under those circumstances the jury would simply have to determine which of those two witnesses they want to believe. So if the person's condition was caused by asbestos, then they can recover and there's no fault attributed to them.

If smoking, on the other hand, they get nothing, period.

MR. ADKINS: But that's not the way the evidence comes in. As you know, is it's going to be combination.

THE COURT: Okay, now—

MR. RION: Most of these cases we're going to have the Plaintiff's case will be, not for most, but some of the cases, the Plaintiff's evidence will be that there is lung impairment that's caused in part by smoking and in part by asbestos.

I guess, you know, my point is, Number One, the smoking doesn't cause the asbestosis.

THE COURT: Right.

MR. RION: It's a different injury and I guess, you know, I think they should be instructed they are not to compensate him for any injury unless asbestos was a contributing factor to the injury.

[240] I guess where we differ is I don't think that under the *Rogers* case that the Court can send an instruction that says what's 100 percent of his loss for "his lung injury" and then apportion between cigarettes and asbestos.

Although, that's exactly what the *Dale* case is and I think the *Dale* case is wrong if you read *Rogers*, and then the only way they get a apportionment percentage, in my view, under the FELA structure is if they prove the Plaintiff was at fault with regard to his injury. Meaning, with regard to his asbestos disease.

And the only way to prove that is that the smoking contributed to the asbestos disease, and I think Judge Watt may

have been right in saying I'm only going to permit it in a lung cancer case, because that's where there is a causation.

And second, if he had some conduct with regard to his asbestos disease from smoking for which he could be held at fault. So, I think you have to show some knowledge of the synergism. So, I would say if there's no knowledge of the synergism, then they're not going to get a place on the verdict form for a percentage.

THE COURT: Synergism doesn't make any [241] difference in this case because we don't have any lung cases.

MR. RION: Unless they can show some connection between asbestosis and smoking. However, I think they're entitled to an instruction that you're not to compensate somebody for any injury unless it's caused by asbestos, and to argue that to the extent these people's problems are caused by cigarette smoking they shouldn't be compensated for that.

And I intend to also say and I think, in fact, I think Fred would be entitled to argue, and in fact—I can remember in the *Garper* case that Al Parnell was permitted to argue this, although it wasn't on the verdict form. That of his lung injury 60 percent—of course, 60 percent of his lung problem is due to smoking, 40 percent's due to asbestos and whatever you think his total loss is, if you want to, this is one way of going about it. You could figure out what his total loss from his lung problem is and do that apportionment.

I think what I'm more likely to tell them is just don't compensate him for his COPD, that we admit he wouldn't be as bad off if he hadn't have smoked and that his—

[242] THE COURT: How can the—I mean, is there going to be some evidence from some source that the jury's going to be able to decide what portion of a person's disability is attributable to asbestosis?

MR. RION: I don't think there's going to be—no doctor's going to sell a percentage. I mean, I don't think anybody's going to give them any guidance on it.

That's another objection I have to having it on the form. There's not going to be anybody who's willing to say that it's 20 percent this, 30 percent that.

I think in Mr. Spangler's case there's a heavy enough smoking history that Dr. Rasmussen said he thinks more of his total pulmonary disability is from smoking disease than from asbestos. He's fairly substantially impaired.

I think Dr. Gaziano will probably say he can't say. It's moderately severe and he can't sort it out. I don't think there's going to be any expert testimony by a doctor saying it's X percent this, X percent that.

I guess the disagreement between the parties is more a function of procedurally how do you go about [243] the notion that the jury's to compensate these folks for asbestos disease and not smoking disease. I don't think there's really any disagreement on that.

It's how do you go about it. I guess the caviat [sic] is I think if you read the *Rogers* case, if the jury were to find that the pulmonary disability is an injury that totally can't be separated out at all and that the railroad's conduct was a substantial contributing factor—not a substantial contributing factor. Contributed however slightly under the FELA standard or statutorily or in whole or in part, is how it reads. Then in the absence of contributory fault I believe it would be 100 percent.

If it is an injury that can't be—that you can't sort out between the asbestos and the smoking and there's no contributory fault, it's 100 percent. I do believe that.

MR. ADKINS: Judge, it's interesting to me, just since we're talking about this is that we're saying the railroads are

negligent because they failed to warn about the dangers of asbestos. There have been warnings on cigarette packs, I think, since about 1968, maybe even earlier, that warns everybody of all the problems.

[244] Now, how can we sit here and say that without warning on there that anybody that smokes that and has a disease process from that is not at least contributorily negligent?

Now, they may not be totally at fault for it because everything else that's involved in that, but to say that, you know, on one hand you're saying to the railroad you didn't put a warning. You didn't tell these men that exposure to asbestos would cause lung disease.

Yet, there's a warning right here with the cigarette in their hand on the pack saying it could cause emphysema. It can cause, you know, low birth rate for women, et cetera, et cetera, et cetera, and to say that that at least is not negligence or contributory negligence on their part, I don't understand how we can say that.

THE COURT: Well, you could say that if you ultimately tell the jury that they don't compensate him for any of the smoking related injury.

MR. ADKINS: Okay, we're talking about the same thing.

THE COURT: Well, I'm not sure we are and [245] the reason is—I mean, the reason why we get—why this is a confusing issue is because we've got different injuries to the same worker. If we're talking about somebody that cut a leg off and a hand off, that's a lot easier to deal with.

In this particular case, because there's so much—a doctor can't just go down to the cellular level and tell you what percentage of the lung is damaged from smoking and what percentage of it is done—damaged from asbestos, but basically that would probably be the best way to approach it.

So it isn't a question of fault, it's a question to the extent to which damage is caused by one or the other.

Now, I just don't know how we deal with it.

MR. ADKINS: Well, we've done this, Judge, in hearing loss cases, for example. All the time in hearing loss cases you have hearing loss caused by noise.

You have hearing loss caused by (inaudible), you have hearing loss caused by any number of things, and the jury hears that. And then they're instructed, then, to find, in other words, again, the employer, the railroad, is only responsible for the noise induced part [246] of that.

Now, the doctors don't come in and say it's, you know, 10 percent (inaudible), it's 20 percent noise at work it's 20 percent running a power saw at home. That kind of thing.

The jury hears all the evidence and based on that they go out and make a finding as to what, I mean, juries do that all the time. It's not—it doesn't have to be a precise thing for them in order for them to do it.

It's the same thing with the smoking or with whatever else is contributing to, excluding asbestos, is contributing to the condition that the person has in his lungs. It could be smoking.

It could be pneumonia. It could be a lot of things. And if the railroad didn't cause any of those things all I'm saying is we're not responsible to compensate that individual for it.

To the extent that we caused damage to his lungs from exposure to asbestos, if the jury finds us negligent, we're responsible. There's no issue on that. We're not contending that there is, but that's the whole, and how you do it is, I guess, is really what [247] we're maybe sort of talking about here, how we handle that with the jury.

THE COURT: Yeah, I think that's probably correct.

MR. RION: Judge, I've got to discount one—sort of one parting notion here that we took up. It goes back to this comparative fault issue.

If you take a lung cancer case let's say the manufacturing context—or let's say the gentleman quit smoking in 1965, so there's no question of comparative fault, and he has a lung cancer synergistically caused by asbestos and smoking. It's not the whole cause, but it's a substantial contributing factor. It meets the legal standard, whatever that might be.

I think in those cases fairly clearly because you can't apportion out some relative contribution and because there's no comparative fault, if my Plaintiff proves his causation he's entitled to 100 percent of his damages under the Joint Several Liability Concept of West Virginia law.

I would say if you read the *Rogers* case, and I'm going to ask you to just read *Rogers* and read *Dale* and I think you'll see that they're—I just think [248] they're inconsistent unless you've got separate injuries.

But, I mean, so if you've got a unified single injury that's simply can't be viewed separately, then if the railroad's conduct meets the legal standard and contributes, we get 100 percent of our loss in the absence of proof of comparative—of contributory fault.

Although, again, I mean, the obvious thing is if, you know, if I get in a car wreck and hurt my arm and then get in a train wreck and hurt my leg, the railroad doesn't have to pay for the arm.

MR. ADKINS: And I don't have to pay for the part of the arm that was damaged as a result of the first wreck. I'm not responsible for the aggravation of the preexisting condition, not for the preexisting condition. So under his—under his

example there, clearly I'm only responsible for the part of the arm that I additionally injured.

The preexisting part I'm not responsible for.

THE COURT: Let me look at the cases and I'll tell you before we get started the first thing in

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TRIAL TRANSCRIPT
April 15, 1998

Brody Testimony

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[71] and Blood Institute, the National Institute of Environmental Health Sciences, and the National Institute of Allergy and Infectious Disease also support my work.

Q And you're doing research primarily on what subject?

A My work is to try to understand how inhaled particles, like asbestos, for example, cause scar tissue in the lung and cause cancer.

Q What is the ultimate goal of that research?

A Well, all of this research that's funded by the National Institutes of Health, the goal is to develop an understanding of the disease so it can be treated. So, hopefully, it can be blocked, at least, help the individual who's inflicted with the disease.

Q Currently, is there an effective treatment for asbestosis?

A There is not.

Q And—but, you're one of the scientific researchers who's trying to find a cure?

A That's correct.

Q Are you a medical doctor or are you a Ph.D. doctor?

* * * *

[98] gas exchange region of the lung.

Q Wait a minute, I've got something I want to ask you, the smaller fibers that can actually get into the lung?

A Right.

Q Are they visible to the naked eye?

A No, not at all.

Q So, the fibers that actually get in your lung and do the damage and cause the scarring are not visible to the naked eye?

A That's correct.

Q Okay.

A But they add to this dusty atmosphere, though. If we get enough small fibers kind of backing up on one another they can refract light and add to what looks like a dusty environment, but the individual particles, if you can see them, they're not (inaudible), but if it's asbestos, that means that if there are particles that you can see, like this (indicating), then that means there are thousands of them.

Q So, there'll be evidence later in the trial that a gentleman named Dr. Meriwether wrote, way back in the 1930's, that if asbestos—let's just stick with asbestos, that if asbestos is in a concentration in [99] the air where you can see dust in the air, then, in his words, the invisible particle must be in dangerous concentration. Is that still true in modern science?

A That's exactly what I'm saying. That's correct.

Q Because Dr. Meriwether said that in 1938. In your opinion, based on today's state of the art science, that would still be true?

A That is correct.

Q Okay.

A So, the next slide, then, I'm going to show you what happens when an aerosol of this dust is inhaled. And so, here, for now, we're going back to the lung, and you recognize where we are now because you're all experts of the microanatomy of the lung. So, here we are at the end of the terminal bronchial where it opens into the gas exchange area and all these little air spaces are, and in the next slide I'm going to show you this area of the lung right here (indicating) immediately after that hour of exposure.

So, we're going to focus in right here (indicating) and now you can see the fibers. You see here's a lung (indicating) and then one's sticking up like this (indicating). There's a curly one right here

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[109] A Right, well, this is what we call—or what the doctor's call abnormalities of gas diffusion, where a diffusing capacity becomes compromised, and that means that—it simply means that you cannot move oxygen and carbon dioxide as efficiently through an area that has scar tissue in it as you can under normal conditions.

Q Once the lung becomes compromised, or injured, from scar tissue in that area—

A Yes.

Q —is there anyway to reverse that process, once it becomes sufficiently compromised that you have detectable abnormalities and gas exchange, clinically, is there anyway to reverse or cure that process today?

A Not that I know of, no. I mean, the cells that are living here, actually, you can see them right here (indicating), they live in this connective tissue space. They keep the lungs with a very normal balance of connective tissue.

They're called fibroblast, F-I-B-R-O-B-L-A-S-T. The fibroblast makes the connective tissue on your skin, or your liver, or your lungs. It's the same cell, and it's—and when it [110] confronts asbestos it makes scar tissue.

Just how depends on how much asbestos you're getting into. Now, you remember, the macrophages was supposed to have been here to clean up this mess, and they try to do that as contact out on the surface of the lung, and I show you one, two, three, four, five macrophages and some asbestos coming down here. They're sharing asbestos fibers with one another. So, they've come—they've actually—in my laboratory we've discovered the signal that calls the macrophages into find the asbestos fibers.

It's a chemical signal that they use to find the fiber, and they pick them up and they do clear off large numbers of them, but in an individual, an animal or a human, that gets too many fibers, they're not able to clean them off sufficiently to prevent disease.

Okay, I'm going to talk about lung injury and then what happens in people in the next few minutes.

Okay, so, I bring us back down, now, to the lung where that you can recognize. Remember, here the airways and here the gas exchange area where I just showed you the asbestos fibers land. So, if these walls, these very thin walls here (indicating) get thickened with scar tissue, the lung gets stiff, and if

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[115] here's the tube right here (indicating).

Instead of the walls being absolutely normal like this (indicating) they have the scar tissue, and the scar tissue runs all the way down the walls near these ducts (indicating), you can see. It should look like this (indicating), instead it looks like this (indicating).

Okay, now, at the ends of all of these airways you see these scars coming out from the asbestos. Now, does this animal—is this animal going to be short of breath? No. Is this animal going to come to the clinic? No. If I kept exposing him these scars would eventually extend out into the rest of the lung and he would have diffuse interstitial fibrosis asbestosis.

Q That's a—this is a good point to ask this question. In this understanding of this area, Dr. Brody, in a human, how much of the lung has to be damaged by this scarring process before it typically begins to show up on chest x-ray at the clinic?

A I understand that about a third of the lung needs to be scarred like this (indicating) before you can actually see it on an x-ray.

Q So, you may have ten or twenty percent of your lung that's already affected by asbestos and [116] there would be no effect on x-ray?

A That's correct. You wouldn't be able to see it. You'd have to actually open the lung and take a section out like this

(indicating) with cytology and look at it to know that there was anything going on. That's right.

I mean, the point here is that what is in this scar, this pink stuff back here is scar tissue (indicating), it's connective tissue. That's what this pink material is back here. The little purple dots are the fibroblasts that make the connective tissue, and the macrophages.

Here's the macrophage right here (indicating). Here are more macrophages (indicating) that are coming in and trying to clean this out. There are also asbestos fibers imbedded in this tissue that remain in there. I need the electron microscope to show you, but we've published all that—we've shown that.

We've shown that. So, this is just—this is from a single hour. Now, if you keep it, as I said, keep exposing, then the scar is spread out, and let me show you, then, what it looks like in a person who's been exposed continuously over time, so—

Q This is human lung here (indicating)?

* * * *

[118] Here's the airspace (indicating). Here's the thin normal wall over here (indicating).

Here's another airspace (indicating), and here's a thick wall (indicating), and just like I asked in the rat, what's in this scar? Now, I can actually make the diagnosis of asbestosis in this person by answering what's in this scar?

Well, first of all, I know the history. I told you his history that he was exposed to asbestos. He has scar tissue in the lungs. Do you see this pink material back here (indicating)? This is all scar tissue. He has asbestos fibers in here (indicating).

Do you see this right here (indicating)? This is called an asbestos body. There's another one right here (indicating).

These are all microfibers and fiberglass that made connective tissue. This person has asbestosis.

Q Now, can smoking cause fibrosis in the lungs that you would get confused with asbestosis?

A No, certainly not. What, actually, smoking causes a very different pattern. Smoking can give you some scars at the ends of these airways but they don't become diffuse out into the lung. In fact, what happens is, the lung tissue actually breaks down [119] out here in smokers rather than getting scarred.

Q That's a different pattern?

A It's a different pattern, that's correct. Okay, so, I've made the diagnosis of asbestosis in this person. I have a one final summary slide that explains just what happened now. So, here's a typical medical textbook illustration of asbestosis.

So, here's a person that's been exposed for a long period of time. Here's the whole lung, as you can see, and then there's this white material infiltrating the lung (indicating). This is scar tissue, and if I were to take a little piece of this tissue out and go backwards from the way I just was, you would see it like this (indicating), and if I went farther back, you would see the electron micrographs of it so you'd know exactly what the lung looks like; and this person, then, has the scar tissue infiltrating the lung, and he has what's called the stiff lung. He also has scarring of the pleura.

Q Medically, the doctors use a different term for this scarring in the pleura versus this scarring on the inside the lungs?

A Right. This scarring on the inside of the lung, if it's caused by asbestos, is asbestosis. If [120] you have scarring out here in the pleura it's generally called pleural fibrosis, and if it's circumscribed and just—actually, you can see it over here on the surface of the lung (indicating), following the pattern of the ribs, it's called pleural plaque.

There's a plaque. It's a circumscribed area of scarring, and that's what's shown over here (indicating), and this is a more diffuse pattern and this is a plaque.

Q Now, we can separate asbestosis scarring inside the lung and then different asbestos pleural changes on the lining of the lung?

A Yeah. You can separate them anatomically, but the process is the same. I mean, it's still a result of injury. Scar results from injury. Okay, and then, finally, this is what the lung actually looks like in a worker (indicating).

Here's that scar tissue you see as infiltrating the lung (indicating). Here's a pleural thickening right here (indi cating), and this individual's lung would surely cause a lung to be stiff.

Q Let me ask you this, Dr. Brody, can—can you have a worker who works around asbestos and breaths the asbestos dust for, say, ten or fifteen [121] years, and that worker may retire and have a normal chest x-ray?

A Sure, it's possible.

Q And he later developed scarring that's visible on chest x-ray, even though he's retired and doesn't have any changes showing up when he retires?

A Right, that's called progression. That means the disease gets worse even after exposure has stopped.

Q How can that happen that he develops more scarring, even after he's retired and no longer works around asbestos, how can that be?

A The reason is because there are asbestos fibers retained in this connective tissue plain of the lung, and as long as there are asbestos fibers in that plain they will continue to cause a reaction that can cause the disease itself. It doesn't happen in everybody, certainly, but it has been documented in a number of workers.

Q When we say—what's the medical term for the fact that somebody can be exposed to asbestos for decades and yet it may not show up on chest x-ray until ten years after they retire?

A That's called latency, and asbestosis [122] has a—you have a latency of anywhere from ten to fifty years. It really just depends on how much the person's been exposed to and their natural—their idiosyncrasy, their susceptibility.

Q Does that pretty much take care of asbestosis?

A Right.

Q Have you done any research, Dr. Brody, on the question of how asbestos can cause cancer?

A Yes, I have.

Q Have you done research on whether asbestos causes cancer?

A No. When I started my work that was established, and as I've done here, more interested in the process rather than whether or not it causes it.

Q My understanding, when you came on the picture as a medical researcher, there was no need to look at whether asbestos caused cancer because everybody understood that?

A That's correct, but it doesn't mean all the questions were answered. I mean, there is epidemiology to do, you have to know how much, but whether or not it causes it is not my problem.

Q And you are looking at the precise

* * * *

[132] A That's correct.

Q Can—we sort of looked at the mechanism by which that happens. Dr. Brody, you mentioned when you began doing this research it was established that asbestos did, in fact, cause cancer in humans. Are you familiar with the human epidemiology on the cancer risk, or persons who have the disease, asbestosis?

A Yes, I've seen that literature.

Q Let's—maybe, we can turn the lights on and—

A This one up here.

Q Yes, sir. Dr. Brody, I'm going to write up here (indicating) the two major forms of cancer caused by asbestos that we've discussed, mesothelioma and lung cancer, and in the studies you've reviewed, Dr. Brody, for people who've been diagnosed with the disease—excuse me, asbestosis, what is the percentage of deaths attributable to mesothelioma in the mortality studies?

A Mesothelioma?

Q Yes, sir.

A I've seen around ten percent in a couple of different studies. So that means that ten percent of [133] the people who have the disease, asbestosis, have died of mesothelioma.

Q Among asbestosis patients who are smokers, or former smokers, what is the lung cancer rate, first of all, mesothelioma, smoking has nothing to do with the risk, correct?

A That's right.

Q That's just asbestos. In a lung cancer it's a combination of smoking and asbestos?

A That's correct.

Q Fair enough. On—I've got a couple of the studies—or two of the studies, Doctor, that you have reviewed in this area. Does that include the studies by Mr.—Dr. Coots and Dr. Berry on mortality of workers diagnosed by a pneumoconiosis panel?

A I think I've seen those.

Q Take a look and see if these are two of them.

A Right, the Coot study is from 1987 which is relatively recent in this field, and the other one is from Jeffrey Berry. Actually, Jeffrey Berry was the person I worked with when I first went to Wales and the United Kingdom.

That's where he's from. He's published this [134] in the *British Journal of Industrial Medicine* in 1981, and I believe this paper showed a similar kind of percent.

Q Let's do both of them. On mesothelioma what did Dr. Coots show?

A About ten percent.

Q Ten percent, and what did Dr. Berry show?

A I believe it was quite close. I think it was nine, ten percent. Something like that.

Q Do you got the—?

A I'm looking. Yes, well, here he says "increased with percentage of disability". He doesn't name the exact percent but he says it's increased.

Coots actually gives ten percent as a number.

Q All right, on lung cancer, Coots gives what percent?

A About thirty-nine percent.

MR. ADKINS: Is that with—excuse me, is that with smoking, Doctor?

THE WITNESS: Yes.

BY MR. RION:

Q In individuals who are smokers, Dr. Brody, who were not asbestosis patients, do you see [135] anything close to the forty percent lung cancer rates in smokers who do not have asbestosis?

A No, I'm sure it's much less than that.

Q Do we have a figure on what Dr. Berry found for lung cancer?

A Yes, it was actually the same. I don't know what the standard deviations were, but, again, it was about thirty-nine percent.

Q Thirty-nine percent. That's a pretty consistent result, though?

A That's right.

Q Again, these are—the lung cancer risks were dealing with asbestosis patients who are smokers?

A That's my understanding.

Q Well, if you combine these two risks, the risk of either mesothelioma or lung cancer, combined, approaches fifty percent, although it's not quite that?

A That's right.

Q That's not just with anybody exposed to asbestos, that's for those who have the disease asbestosis?

A That's right, meaning they've had the [136] highest kinds of exposure.

Q In your opinion, are those who are exposed but do not have the disease asbestosis also have an increased risk of both of these diseases?

A Well, they do, quite clearly, have an increased risk. It doesn't reach these levels but it does—they certainly have an increased risk.

Q Dr. Brody, when you leave Tulane and travel like this to testify in Court do you charge for your time?

A Certainly.

Q And what's your hourly rate for this type work?

A Three hundred dollars per hour.

Q Have you testified in Court before regarding your asbestos research?

A Yes, I have.

Q Do you know how many times?

A Oh, it's something—maybe a dozen times a year. Something like that.

Q Has that been, on most occasions, at the request of lawyers who represent victims?

A Most of the time, yes.

Q The first time you ever testified in a

* * * *

[147] background, is what we're talking about. The background of people who are not occupationally exposed.

Q Well, could people that are not occupationally exposed have more than a million?

A It's possible but a million seems to be about the upper limit that's been established.

Q Okay, and, how many grams of lung do we have; how much would a lung weigh?

A Well, lungs weigh about four pounds. There's four hundred and fifty four grams in a pound, so about four times what your—

Q So we'd have probably over a trillion fibers in our lungs? And if I understand you right on your direct examination, then, from what Mr. Rion asked you, then, a trillion fibers if, I guess, of asbestos, then, would fit into a thimble, is that what you're saying?

A Easily.

Q And, the people—all of us that are not occupationally exposed to asbestos are normally healthy individuals, aren't they?

A I hope so.

Q You're not saying that everyone occupationally exposed to asbestos fibers is going to [148] get asbestosis?

A Certainly not.

Q And it's not gonna make them sick and it's not going to make them go to a doctor, necessarily?

A Not necessarily, no.

Q People that are occupationally exposed, it is variable as to how they're exposed, some people might be exposed heavily, some might be exposed by lightly, and sort of even in the same environment; isn't that true?

A That's true.

Q And you're not saying that a single asbestos fiber in the lungs is going to cause asbestosis, are you?

A Not at all.

Q You cannot testify to a reasonable degree of medical—scientific certainty that any particular person exposed to asbestos will develop either—any of these cancers or asbestos that you've talked about?

A I cannot say specifically, no.

Q Also, in terms of progression, asbestosis does not always progress, does it?

A That's correct.

* * * *

[150] A. Now, you've got the question right, you left out smoking in the first one. Yes.

Q I'm sorry.

A In workers who are exposed to asbestos who smoke, then cancer—

Q My point is, though, if you are a nonsmoker and you're exposed to asbestos occupationally, your risk of lung cancer is less than two; isn't it?

A In some cases—it's small. I'm not sure, less than two, but some say five percent, but certainly it's significantly less than the number you see there.

Q So it would appear here that that confounder of the problem here is smoking; is that—

A The point is that cigarette use, plus asbestos exposure causes a synergy. That means, you don't just add to the affect, the affect is multiplied. So, you take the affect of cigarette use along, which causes along a thirty-fold increase, plus asbestos, you don't get just an increase of that small asbestos in the lung, you get this multiplicative effect which takes it fifty-fold increase.

Q Right. And that fifty-fold increase is caused by the fact that the person is smoking?

* * * *

TRIAL TRANSCRIPT
April 15, 1998

Vance Testimony

* * * *

[169] THEREUPON CAME,

CLIFFORD VANCE

who, having been first duly sworn according to law, testified as follows

DIRECT EXAMINATION

BY MR. BOITER:

Q Good afternoon, Mr. Vance, how are you?
A All right.
Q Okay. Are you a little nervous about testifying?
A Probably.
Q Have you actually ever testified in a Court of Law before?
A No.
Q Well, I'm going let you—the first thing I'm going to get you to do, if you don't mind, is tell the jury your full name.
A Clifford Oscar Vance.
Q Are you married, Mr. Vance?
A Yes, sir.
Q What is s your wife's name?
A Edra.

THE COURT: If you would, please, sir, why don't you pull that microphone down just a little bit [170] closer?

THE WITNESS: All righty. I don't talk too loud anyway.

THE COURT: Can you hear okay, folks? Go ahead.

BY MR. BOITER:

Q How long have the two of you been married?

A I believe it's fifty-six years, this November—coming November.
Q Is Mrs. Vance actually in court with you today?
A No, sir.
Q Is she just physically unable to be here?
A Well, I can't say she wouldn't be able to be here, but it would disturb the way she takes her medication and stuff, and it would be hard on her.
Q Did the two of you have any children?
A Yes, sir. We have twin boys and a daughter.
Q I believe you told me last night it was kind of a surprise when the two of you had twins?
A Yes, sir. My granddaughter's got twins [171] already.
Q Where do you and your wife live?
A We live in between Bluefield and Princeton, in the Glenwood area.
Q And about how long have you-all lived there?
A About three years this past December.
Q Where did you live before that?
A We lived down next to (inaudible) address, but we lived on about six acres.
Q Would you tell the members of the jury how far you went in school?
A I completed the ninth grade.
Q Where did you actually go to school?
A Iaeger, West Virginia.
Q Is that where you were born?
A Yes, sir.
Q How old are you, sir?
A Seventy-seven this past February.
Q Were you ever in the military?
A No, sir.
Q Did you ever volunteer for the military and were turned down?
A Yes, sir.
[172] Q Why do you think you were turned down?

A Well, they had a lot of things on my report. I have a valvular heart disease, and some—I don't know what all they did have on it, but, anyhow, what it amounted to was that I only weighed 110 pounds and was six foot, one inches tall.

Q Have you ever been diagnosed with a heart problem since then?

A No, sir.

Q One hundred and ten pounds, and six feet one?

A Six feet one, with bright red hair.

Q Growing up, did you ever smoke?

A Yes, sir.

Q When did you stop smoking?

A I would say in the middle of the late '30s.

Q You stopped smoking in '85 and haven't smoked since, right?

A Yes, sir.

Q Did you ever try to quit prior to 1985?

A Yes, sir.

Q You just weren't successful until '85?

A That's correct.

[173] Q Tell the jury when it was that you first started working for Norfolk and Western Railroad.

A I started to work for Norfolk and Western Railroad on the 4th day of November, 1942.

Q What was the date when you graduated from high school?

A I didn't graduate.

Q Well, ninth grade, I'm sorry.

A Around, I'd say '35.

Q What did you do between '35 and '42 when you went to work for the railroad?

A I drove a coal truck a little bit. House coal, back then, was very popular, a two ton of coal. So, I drove a small dump truck and just worked in a grocery store or whatever I could find just to make an honest living.

Q Just sort of odd job type stuff during that period of time?

A Yes, just whatever somebody wanted.

Q Were there any jobs in that period of time that you believe you worked where you would've been exposed to asbestos?

A No.

Q So you started to work at the railroad [174] in '42; how long did you work for them, when did you retire?

A I retired—I had, actually, almost thirty-three years, and I retired April 3, in '81. I was cut off in the 70s.

Q So you think you worked from '42 to '81 but you were cut off for about seven years in between?

A Yes.

Q When you went to work at the railroad in 1942, what shop facility did you start working in?

A I started in the pump house. They would pump water up to the tank, and mixing the chemicals to treat it, and that's about all I did for the first couple of months.

Q That probably wasn't a real good question. Let me ask it to you this way, what railroad yard did you actually start working in?

A Iaeger.

Q Okay. So you went to work in Iaeger in the pump house?

A Yes, sir.

Q How long did you actually work in the pump house when you started at Iaeger?

A Oh, a couple of months.

[175] Q What was the mixing of the chemicals that you were doing actually for, what were you actually doing?

A They had chemicals that was to treat the water and keep it from foaming so bad, and keep down corrosion, and I can't tell you what all that they were. But they had a big old tub with a peddle in it and you added so much of this, that

and the other, to get your mixture just right so it could be pumped in with the water.

Q While you were on the job at the pump house for those two weeks, do you know or do you believe you were exposed to any asbestos products?

A I don't think so. Not that I know of.

Q After you left the pump house, where did you go from there?

A I went over to the shop, which is all the same place, but just went across the tracks.

Q Is that still at Iaeger?

A Yes, sir.

Q Was it in the roundhouse, was there more than one shop or was it just a roundhouse, or what?

A What we call a running track which inspected the engines, and we had what you call the dead [176] track of two tracks in the roundhouse, and my job at that time was to clean up the roundhouse. If they had to remove a jacket on the steam engine or something then they'd have asbestos to clean up; brake shoes and whatever.

Q Were they parallel lines that just run up to a long straight building; is that how it worked?

A It was more or less a roundhouse with a machine shop in part of it, and it just—it just held one steam engine. It was built for one steam engine on two tracks.

Q One on each track?

A Yeah, one on each track.

Q About how far apart were the two tracks?

A Possibly twenty or twenty-five feet, something like that.

Q You said one was a running track and one was a dead track. Explain to the jury what the difference is between a running track and a dead track.

A A running track is where we service the steam engines from each stage of work, and it would be inspected and the brake shoes, and see that there's nothing seriously wrong with

them—if they was able to make another trip. And the dead track was where we [177] knocked the fire out of the engines when they came in to do a monthly inspection, or something had happened that you had to wash them out.

They had to be washed out once a month and checked out real good, the boilers and leaks repaired—minor leaks repaired, just minor problems. In the shop where I worked, we didn't do any heavy work. Usually the minor leaks was repaired. Just minor problems was repaired there, usually in one day. Sometimes we'd run into two days.

Q During the period of time when you were a laborer in the roundhouse, what was a typical day like; can you describe for the jury sort of what you'd do during the course of a day?

A I used to—after I came to the first shift, I usually went out and serviced the passengers and coaches. We had a passenger train up until '49. Cleaned them out inside, just the normal cleaned them out, did what I could for about an hour. Iced them up, the coolers. At that time you used ice in the coolers, you didn't have electric ice machines. Get them ready for a run with passengers on them.

Q What would you do after that? How long would it take you to do that?

[178] A Between that, and I took care of the icehouse most of the time, which they issued ice in small quantities, and then I would—after that, after the train left I would work in the roundhouse, cleaning it up.

Q About what time of the day would you be done with the work trying to get the passenger train ready to leave?

A Oh, 9:30, 10:00.

Q After that you'd go out in the roundhouse?

A Yes, sir.

Q Tell the jury what was going on out in the roundhouse and what type of activities you, yourself, did out in the roundhouse during the course of a day?

A I cleaned up and picked up the brake shoes, mainly what dust or asbestos or whatever was spilled in there in the roundhouse, I cleaned it up. And they wanted the roundhouse cleaned every day on the first shift, and whatever was there was just what I had to clean up, put the tools back in the proper place.

Q Did you ever see the steam locomotives that were on the dead track with their boiler jackets [179] off of them?

A Oh, yes, not completely, now, but certain sections.

Q I'd like to show you, if I could, and it might be easier if you come around so I can sort of let you look at them, I want to show you this photograph and ask you if you sort of recognize what's going on there?

A Oh, yes.

Q Would you tell the jury a little bit about what's happening in this photograph?

A If you've got a leakage under here (indicating), but if this engine is leaking steam or water—hot water, whatever, under the jacket here, they've got to remove the jacket, pull this stuff off, and the boilermakers will dry those leaks up and then it has to be pumped up and put back on there.

Q Did you actually see this process taking place where they would wire the asbestos on?

A I would haul this stuff in for them. I hauled it in the roundhouse for them.

THE COURT: If you could keep your voice up just a little bit.

BY MR. BOITER:

Q What were you saying?

[180] A I hauled that in the roundhouse for them and I, also, mixed the mud.

Q The mud?

A The mud.

Q You talked about hauling these blocks into the roundhouse. Where would you actually go to get these asbestos blocks?

A Well, it wasn't much further than, maybe, here to the door back there, but you crossed two sets of tracks—one set of tracks, excuse me.

Q And where were they—were they stored in a building, how were they stored?

A They were stored in something like a four-by-six building that were stacked, the long pieces, but your powder mixture was in a barrel, and the building was just usually pretty full of asbestos.

Q What would you do in terms of bringing the blocks to the folks, I mean, how did you transport them from one place to the other in the shops?

A Wheelbarrow.

Q Who were you actually taking these to?

A I was taking them to the boilermakers.

Q What was the boilermakers doing with them?

[181] A They were the ones who put them back on there and fixes your jacket back to it's original position.

Q You talked about, also, one of your responsibilities was getting the asbestos to the mud. Was that kept in the same place?

A Yes, sir.

Q How did you get that material?

A We took a shovel and digged down in there and poured it out in the wheelbarrow.

Q Did you do any of the cleanup work after the guys were through doing what they were doing?

A Yes, sir.

Q What, specifically, did you do to help with the cleanup?

A We either swept it up and rolled it out in a wheelbarrow, which was most likely what we did, then later

on in the later part of it they did go wet that down a little bit to do that.

Q How long were you actually a laborer in the roundhouse doing that type of work?

A I went to work August 1 of 1945.

Q So, from '42 to '45, essentially, you were doing this labor work?

[182] A Labor work.

Q When you were actually doing the sweeping of the asbestos that had been thrown off the boilers, did that create dust in the air?

A Yes, sir.

Q Is that dust that you would have breathed if you knew you were breathing it?

A Oh, yes, you would breath it.

Q In the process of mixing the loose asbestos up to make a mud with, was that a dusty process?

A Yes, sir, it was.

Q Can you sort of describe in your words so that the jury can understand just how sort dusty it was?

A It was dusty enough. If you poured water on it with a hose it would make dust until it all got wet.

Q Was it actually dust that you could see physically in the air?

A Oh, yeah.

Q About when the locomotives came in and they took jackets, or part of the jackets off of them to do their repair work, did that create dust in the air?

[183] A Yes, sir. A good bit of it.

Q Describe for the jury what happened once that jacket came off.

A They'd take the jacket off—of course the metal come off first, and then they'd just rake it off the best way they can.

Q Looking at this picture, what if they were removing the asbestos off of this particular locomotive, would they

hand it to somebody to put down on the ground or would it just fall down to the ground, or what happened to it?

A Pull it off and just fall down to the ground.

Q Did it create dust when it hit the floor?

A Yes, sir.

Q A little bit or a lot?

A A lot.

MR. ADKINS: Your Honor, just for the record, could we kind of mark those so when we're talking about this picture, we'll know what we're talking about?

THE COURT: Yeah.

MR. ADKINS: Otherwise if the record only [184] reads it, we won't know what we're talking about.

THE COURT: Yeah, right. I agree.

MR. BOITER: The first photograph I showed, which is the workers actually putting asbestos on will be 17RR-1. The second picture we talked about was 17RR-2.

THE COURT: Okay. They'll be so identified.

(WHEREUPON, the photographs referred to were marked for identification as 17RR-1 and 17RR-2.)

BY MR. BOITER:

Q You indicated the next job you had was that of a hostler?

A Yes, sir.

Q Explain—well, first off, was that still at Iaeger?

A Yes, sir.

Q Explain to the jury what a hostler did.

A A hostler came on when the steam engine came in the ash pit, which was the first place they came to after they'd been on their run; and the hostler job was to spot that engine, and we had a laborer with us and we cleaned the fires. Now, not all the time. Not [185] all the time. The hostlers didn't all

the time clean the fires. A lot of times the laborers did, but most of the time the hostlers went out there and one laborer.

They shook the grate. One of them shook the grate and the others blowed the ash bins and then we sanded the boxes. We sanded both boxes. The steam engines had two boxes on them and we had just one sand spout. So we'd sand the front one and then we'd move it down and sand the other box, and then we'd bring that engine on down to the wash rack with hot water and wash the grease off of them that was created through the day; and then we'd take them to the coal wharf and put a little coal on them.

They went in and went through the roundhouse for the machinists, pipe fitters, or whatever, to inspect them. And then we took them and watered them, filled the water tanks full, filled the coal bins full, and prepared them.

If they were going out the next morning we'd prepare them till they would set and still have steam in them and get them hot when the morning came in time for the run. And they was two of us that did that, a hostler and a fire and water tender.

Q Okay. I don't want to leave the hostler [186] but I want to back up a second. I want to go back to the laborer.

A All right.

Q What was your work schedule during the period of time, the '42 to '45 time period, when you were a laborer there in the shop?

A I had a pretty good work schedule. I worked the day shift mostly.

Q How many days a week did you work there, we're talking '42 to '45 now?

A '42 to '45 we worked seven days a week.

Q How often would you get—working seven days a week, how often would you get a day off?

A Well, they was pretty good about that. If you worked, say, a month or six weeks, or something like that, they would

let you have the day off, and they was good about letting you have a day off in case of sickness or something like that. Why, the company at that time was real nice to us.

Q Okay. The activities you described earlier, the sweeping out of the asbestos, when the mud was being made, the work on the steam locomotives, is that something that was done the first thing everyday there in the shops?

[187] A They didn't pull jackets on all the engines that went through the inspection—the monthly inspection. They didn't do that. They had to have a bad leak or something, but you could say several times a month.

Q How often would you do the process of sweeping asbestos or mixing the mud or stuff like that, say, in a seven-day work week?

A Possibly, a couple of times. Maybe four times. You just don't know. It depends.

Q What would you do with, say, the old asbestos after you swept it up?

A We rolled it out in a wheelbarrow and dumped it over the bank—the river bank.

Q Say in a typical work week, how many days a week would you describe the shop as being a dusty environment to work in?

A Being dusty. In the shop I would say six days or something like that. Usually on the seventh day, or Sundays, we usually had the engines stored and had them bedded down. We had fire in them to get them ready to go again.

Q Going back to the next time period when you were a hostler, I believe that started in '45, how [188] many—what shift did you work at that point in time?

A I started out on the night shift.

Q How many hostlers were on the night shift with you?

A I was the only one.

Q You were the sole one?

A I was the hostler.

Q Is it fair to say, then, if a locomotive went into the shop and a locomotive came out of the shop on the night shift it was you who moved it in and moved it out?

A Right.

Q Were the same type of repairs, the same use of asbestos going on in the period of time when you were a hostler?

A Yes, sir.

Q It wasn't just somebody else who was sweeping the asbestos, it was you?

A That's right.

Q How long did you actually stay in that position as a hostler?

A I worked at Iaeger from 1945 with the exception of about three or four months there in '46. As a hostler until December, 1959.

[189] Q During that entire period of time, from '45 to '59, was N&W still using steam locomotives?

A Oh, yes.

Q They still had boilermakers taking the jackets off of their engines?

A Yes, sir. That's when I was put off.

Q During that entire period, asbestos was still being stripped of steam locomotives?

A Yes. It was practically the same work.

Q Would you have—as a hostler, would you have still been in the shops when the repair work was being done on the steam locomotive?

A Oh, yes, sir.

Q Do they still—was it still dusty from that '45 to '59 time period in the shop?

A At times. Yes, sir.

Q Do you believe you were personally breathing dust generated from asbestos products during that period of time when you were in the shop?

A I do. I didn't realize it at the time.

Q You didn't realize it was that dusty?

A I didn't realize the danger of asbestos.

Q What happened—you indicated you got laid off in 1959, what was—what sort of caused that?

[190] A I went back to a laborer in 1959 until June. I was actually cut off in June, 1960.

Q I'm sorry. When you worked the 1960 time period as a laborer, did you do the same things you had done as a laborer before?

A No, sir. There was very little work to do there during that period of time. They had the (inaudible) and they kept one machinist for a little while and they kept me as a laborer. I was the only one they had left, and we just—we just didn't do much. It was mostly just sweep out the diesels.

Q And eventually, you were laid off because they didn't need you once they went to diesel engines?

A True.

Q What did you do at that point in time, we're talking about roughly 1960?

A I did about anything I could to keep those boys and my daughter in school. I went into a filling station attendant for a little while, and I drove a big coal truck for a little while. I went to Michigan and worked at _____ Products for a little while, and then I was cut off up there; and I came back home and I don't remember exactly what I did, just [191] whatever I could find to make a little money.

Then I went back to Michigan again and I was in Michigan when they called me back on the railroad, '67 they called me back to Bluefield.

Q So you eventually went back to work at the railroad?

A Yes, sir.

Q What—when you went back to work for the railroad in '67 at Bluefield, what were you doing then?

A I went back as a hostler.

Q Did they still use asbestos up in Bluefield?

A They still had some asbestos there, and we had pipes that were wrapped in asbestos. I've been told that there was more asbestos than I thought they was in the diesel, but I didn't see it. But I had saw some dust from them.

Q Did they have stationary boilers up in Bluefield that had asbestos on them?

A Yes, sir.

Q When you talk about overhead pipes with asbestos, what are you talking about?

A I'm talking about from the boiler over [192] to the roundhouse, which was maybe four or five hundred foot from the boiler.

Q What sort of condition was those overhead steam pipes in?

A They was in fairly good shape, and they repaired some of them sometimes, but they had asbestos insulation on them.

Q What sort of process took place when they would repair them?

A Sir?

Q What type of process, physically, what did they do when they would repair one of those steam lines?

A They cleaned the old off and put the new on, but it was mostly outside.

Q Were the shop conditions up at Bluefield dusty?

A Dusty and smoky.

Q We're talking about a period of time when there were diesel locomotives there, right?

A Right.

Q So, I'm assuming that your—do you feel like your asbestos exposure at Bluefield was actually less than it was during the steam days?

[193] A Oh, yes, sir, but we had more dust, I believe.

Q When did you ultimately retire from the railroad, 1981 I believe you said?

A I retired the 1st day of April, 1989.

Q What type of retirement did you take in '89?

A I took a regular retirement.

Q During the entire period of time that you worked at the railroad, essentially starting in '42 up through your '81 time period, did anyone at the Norfolk and Western ever tell you about the hazards of asbestos?

A No, sir.

Q Did they ever have any safety meetings where they sat everybody down and said, we need to tell you about asbestos hazards and you need to be careful?

A Just the last little bit I worked they put—I said the last little bit, I don't really know, but we had hard hats and goggles. They made us wear that. If you wore your regular glasses you had to have shields on them to protect the eyes.

They finally did that on a count of the sand blowing and all that stuff.

[194] Q When did they give you hard hats and goggles?

A I'd say four or five years before I retired. I can't pinpoint that.

Q Before you retired did they ever sit you down and say, here's how you need to handle asbestos to make it safer?

A No.

Q Did they ever—did the railroad ever provide you with any type of mask or respirator to help protect you from the asbestos dust?

A No, sir.

Q Did they have any sort of asbestos safety program in place up until you retired?

A I don't really know. I was, like I said, the only thing that I received was the glasses and hard hat.

Q If they had one they never told you about it?

A No.

Q Did the railroad ever come to you and say, we'd like to examine you, we want to take a chest x-ray to see if you have any problems from the exposure to asbestos?

[195] A No, sir.

Q Did you ever see any warning signs anywhere around the shop posted about the hazards of asbestos?

A No, sir.

Q Did you ever see anybody come into the shop to try to take measurements to see how dusty the shop conditions were?

A No, sir.

Q Would you tell the jury what year you were diagnosed with asbestosis?

A '91.

Q In 1991?

A Yes, sir.

Q What's your understanding of what asbestosis is?

A From what I've been told it's a hardness of some portion of your lungs. It's kind of like a crust, and it affects your breathing ability.

Q How has this affected you, in terms of your breathing, in terms of your overall physical condition?

A If I exert myself any at all and I walk too fast, or going up a hill, or if I lift anything. It [196] just doesn't take much. I just can't breath. That's what it amounts to. I just feel like I'm gonna fall dead or something.

Q Is it that way everyday?

A No, sir. Some days it's a little better than others.

Q Good days and bad days?

A Huh?

Q Good days and bad days?

A Yes, sir. Good days and bad days with this breathing.

Q Are there any types of things that you can do that sort of make it a bad day, I mean, what's—what gives you problems?

A If you work on very small yard. I've got a seventy-by-eighty lot, and it only takes about twenty minutes to mow it, and if I happen to get in a hurry and mow it all at one time, I've got to set down and rest for a good while.

So, hurrying don't help me any at all. I'm better off to take my time.

Q Is that the way it was ten years ago, did that change since—

A No, that's changed a real good bit in [197] the last five to eight years.

Q What—tell the jury what you mean by it's changed a real good bit.

A Shortness of breath and not being able to do the things that you have been doing in the past without just getting plum out of air and having to set down and wait until you do feel like moving again. I seem to have strength but I don't have the air, and you just have to set and wait on it to catch up.

Q Has your yard always been that small?

A No.

Q How big did it used to be?

A Oh, I'd say a couple of acres.

Q When you had a couple of acres were you able to cut that lawn?

A I moved from Montcalm in '79. I lived there fifteen years, and when I moved down there I could take care of everything, the weed eating, the mowing, didn't bother me, but the reason I sold was because I couldn't keep it up.

I'd just—I'd get out there weed eating or doing something that needed to be done and it'd take all day to do anything. I have to do just a little bit and wait a while, and when it gets real hot it's bad. I [198] can't breathe.

Q When was it that you moved and sold to this smaller lot?

A December of '94.

Q You mentioned you had some grandkids, how old are your grandkids?

A I've got one boy twenty-seven, and I believe the youngest one is the girl and she's nineteen now.

Q Any great grandkids?

A Yes, sir.
Q How many of those?
A About seven.
Q Can you today do the same things you could do with the grandkids, the great grandkids ten years ago?
A No, sir.
Q Are there any other types of daily activities that sort of jump to mind, I used to do it this way and I used to do it that way?
A No, sir, I don't exert myself. I'm trying my best to stay off oxygen. I'm a person who doesn't like the doctors too well.
Q Besides your breathing problems I think [199] you've also got some arthritis problems?
A Yes, sir.
Q As the breathing has gotten worse, how do the two of those sort of work together?
A That's sort of hard to explain. The arthritis bothers me and my breathing makes me weak.
Q You also take some blood pressure medicine?
A Yes, sir.
Q Is your blood pressure under control?
A Yes, I have no problems with it.
Q You also take heart medication, I believe?
A Yes, sir.
Q Other than those problems, do you have any other significant medical problems?
A No, nothing I have to take regular. I take Pepsid when I need it. If I have a little indigestion problem, I take a Pepsid for that.
Q As a result of your knowledge that you have asbestosis and what you know about that, do you have any concerns that you might develop cancer due to your exposure to asbestos?
A Well, it makes me think, occasionally.

[200] Q Have you talked to anybody about the asbestos disease that you sort of confide in?
A Not too much because my wife has a nervous condition and I don't tell her too much about anything.
Q Do you try to sort of keep all that from your wife?
A Yes, sir.
Q In terms of your concerns about potentially developing cancer, what is your worst fear?
A Well, that I would have to leave her and the children; and the fact too, that she is so dependent on me. I can't get her to take over writing the checks or things like that. Her nerves are so bad she can hardly concentrate and that worries me a bit much.
Q Is there any question in your mind that during the period of your work with the N & W Railroad that you had extensive exposure to asbestos?
A No, there is no question I was.
Q Besides in the shop did you ever get any exposure out on the railroad line?
A Yes, sir, a good bit. Emergency firing and things like that. And there is times when a steam engine will come in and there will be just white stuff [201] all over everything and you have to get rid of that.

MR. BOITER: That's all the questions I have for you Mr. Vance. Just keep you [sic] seat because you'll have some questions from defense.

CROSS EXAMINATION

BY MR. ADKINS:

Q Good afternoon, Mr. Vance. I'll be very brief, I think. Just a couple of questions. It's more of an education for me and I hope you can endure it, too, because we're going back a little bit before my time, too.
A Yes, sir.

Q I wanted—you know, you talked about this shop there—was it in Iaeger? Is that where it was?

A Yes.

Q Iaeger wasn't a very big operation during that time, was it?

A Iaeger was pretty well steady, we had several mines running and at one time we had about twenty-six mines running.

Q What I'm talking about, though, is they didn't have a big back shop there where the [sic] overhauled the locomotives and that sort of thing.

[202] A No, sir.

Q So, what you're talking about there at Iaeger during the steam time was a small running repair kind of shop; isn't that right?

A You had the running repair on one track and you had the monthly inspection on the other side where you had to wash the boilers out, check for leaks.

Q Well, the only point I'm trying to make is, for example, it wasn't the kind of shop where you were taking the locomotive apart and putting it back together and fixing it; you didn't do that at Iaeger, did you?

A Oh, yeah, they took several—they removed the jackets—

Q I understand, I understand, but what I'm asking you is did they do the complete overhaul work there like they did, for example, at Princeton or at Bluefield?

A No, no.

Q That's what I thought., You talked about this stay bolt repair that you were doing. Was that something that was fairly common on a steam engine, a stay bolt would go bad?

A Oh, yeah.

[203] Q If a stay bolt went bad what happened on the steam engine? Did it leak or leak steam, water—what came out?

A I will explain it to you the best I can. I understand that you don't realize what it was.

Q No, I don't.

A A steam engine normally works from a two hundred, two-hundred-fifty pound (inaudible). When it came in the shop, we didn't keep any of the steam on it. Sometimes we get down to a hundred pounds of steam. We'd cool them off and then fire it back, heat it back and we'd create a leak.

Q Well, I guess what I was trying to establish was whether if the bad, it was a steam leak. Was that the problem? If you're out on the line and you have a steam leak, obviously, the engine is losing power, I assume, if it's losing steam; is that right?

A Well, sir, when they was real hot they wouldn't be leaking real bad, but the pressure would begin to drop as they begin to cool a little bit, it's real hard to keep a fire in them if it's leaking in a firebox.

Q Now, if it's leaking, it's leaking steam; is that right?

[204] A Steam and water.

Q And if it's leaking steam and water, and I realize this is not in a shop, this is an exhibit 17RR, these stay bolts they were replacing, that water, I take it, the steam would leak out, so this asbestos that they were removing off that engine, is would be wet; wouldn't it?

A Well, by the time they got it in the shop there and got the jacket off of it and everything, usually it was pretty dry, because you had to remove a bigger area than you had to repair.

Q Well, part of it was wet then; would that be fair?

A That would be fair.

Q And to me, and again I'm not a railroader, but to me running repair to me, sort of because you use running is sort of something that can be done quickly. Is that running repairs are as opposed to an overhaul where you are taking an engine in and you're going to do major kind of things to it; is that correct?

A Running repair was your daily inspection.

Q So, the engine was gonna turn around and go back out real quick in running repair?

[205] A Well, not necessarily, these are eight hour shifts.

Q Well, that's what I meant by real quick as opposed to a month or two months or however long it took to completely overhaul; is that fair?

A That's correct.

Q Now, you, as I understand it, were in this Iaeger shop, as a laborer just for two years; is that correct?

A No, I was a laborer from November the 4th in '45, I mean '42, until August the 1st in '45.

Q Okay, about three years then; is that right?

A And I went back for about four months after that.

Q Okay, I'm talking about the first time.

A Yes.

Q And the rest of the time, then, you worked as a hostler for the railroad; is that right?

A Yes.

Q And certainly in 1967, after you have the lay off of about nine years, I guess it was, you came back and when you came back then the steam engines were gone and you were a hostler for diesel locomotives; is [206] that right?

A Yes.

Q And is it true that a hostler for a diesel locomotive, basically, service that locomotive; is that part of his job?

A We didn't do as much servicing as we did movement of them, but we had laborers that fueled them and sanded them; and the machinists to do the brake shoes, the check the oil and water and everything in the diesels. And in the case of a running repair, you didn't do anything unless it was an emergency in Bluefield. And most of the time they just fueled them and sent them on their way.

Q And when you were, I take it then as a hostler, you were actually operating the diesel engine as an engineer. I

mean, the same thing the engineer did except you were doing it in the yard as opposed to out on the open line, basically, is that true?

A That's correct; in the shop and the yard.

Q So, from nineteen and sixty-seven until you retired in 1981, then basically, you operated a diesel engine; is that fair?

A They operated and separated them and put them together. That's where you created all of your [207] dust was taking them apart.

Say, that a consist would come into Bluefield of five little units, one of them was due in Roanoke and the other, we would take that one out that group and find another one to put in it's place.

Q And that would have been outside. In other words—

A That would be anywhere, in the house, anywhere.

Q Most of the time this consist would be, like you say, a group of engines, that would be a consist; right?

A That's right.

Q And part of your job, then, was to break this consist up and make sure the engines got to wherever they needed to go; is that fair?

A That's right. That's right. We took them apart and put them together.

[208] Q And that, basically, was done in the yard most of the time, occasionally might have been done inside.

A They put a—in the yard. In the yard that's where we'd add to or take away from the train.

Q But you, during that period of time from '67 till '81, you never actually worked on diesels, did you?

A I never worked on diesels at all.

Q That's my point, you didn't. So, you didn't repair them at all?

A No, we took them apart and put them together.

Q Okay, that's what I want to make sure the jury understands when you say you're taking them apart. When you say you were taking them apart, by taking them apart, you mean you disconnected where the couplers that attached them together?

A Right. You've got three or four airlines.

Q Yes, I understand, but what I'm saying is when you say you were taking them apart, I didn't want them to think you were taking the diesel apart. We're [209] taking engines and separating them in separate units.

A Yes.

Q You mentioned, you said something about—I'm not sure I caught it exactly, about a wet down that you all were doing, or something. What was that about, when you worked as a laborer there at Iaeger?

A Well, basically, nobody told us to do it, but we'd wet down when we could and get out of as much dust as we could.

Q So, you, all there on your own, if I understand you right, were wetting down the dust and so forth; is that right?

A Unless it was already there and it might have already been there for two days a before I could get to it before I swept it up.

Q Before you swept it up and moved it around you were wetting it down?

A Not all the time.

Q Sometimes you did that?

A Sometimes.

Q You indicated that you—how long did you smoke?

A It seemed to me like I did it about [210] forty-eight years.

Q And during that forty-eight years, how much did you smoke?

A

Q What kind of cigarettes did you smoke; do you recall?

A I smoked several different kinds.

Q Do you recall any one you liked more than the others?

A I can't recall.

Q Did any of your doctors ever tell you it might not be a good idea to smoke?

A No, sir.

Q They never told you that, advised you not to smoke?

A No.

Q I thought I something in your deposition about maybe 1978 or 1978 doctors had told you not to smoke. Does that jog your memory at all?

A I would say that probably the doctor I had at that time told me that it wasn't good to smoke.

Q Okay. When was the first time that you went to see a doctor because of breathing problems that [211] you were having; a breathing doctor, in other words? The first time you went to a doctor because of breathing problems.

A Ninety-one.

Q And how long had you had breathing problems before 1991?

A It's hard to say.

Q Is there any particular point in time when you associated the breathing problems with your work?

A Yes, when I went to the doctor.

Q My question to you was when was that, what was the date? Was that in '91, also?

A That was in '91.

Q So, that was the first time you went to the doctor because of breathing problems and that's when you learned, at least, from what the doctor said, and so forth, that some of them might have been associated with your work; is that right?

A That's true.

Q Did the doctor indicate that some of your problems might have been associated with your cigarette smoking?

[212] A No.

Q Didn't mention—did you tell the doctor that you were a smoker who smoked for forty-eight years?

A Yes, sir.

Q And he didn't say—who was the doctor you went to see? Do you remember his name? Is he in Charleston?

A No.

Q Where was it?

A I don't really know, I don't remember?

Q Now, you said you were—I want to ask you a couple of other questions. You also mentioned that your—I think in the deposition that we took that your father was also a smoker; is that correct?

A Yes.

Q Did he smoke when you were around him at home?

A Yes.

Q What about your mother, did she smoke?

A No, sir.

Q Did you have any brothers and sisters that were smokers at home?

A No, sir.

[213] Q You indicated—just one other question, Mr. Vance, you indicated that you fired, and by that I assume you meant you were a fireman on steam locomotives?

A I have assisted on firing; I didn't have a regular job doing it. During World War II, they run (inaudible) and they invited us to do it to take care of the work.

Q And did you fire—would you say that was a main line kind of operation, or would—

A Shifters.

Q That would be mine run shifters; picking up coal?

A Yes, sir.

MR. ADKINS: That's all I have.

REDIRECT EXAMINATION

BY MR. BOITER:

Q I want to go back to this picture, if I could. Mr. Adkins was asking about stay bolts and the steam that would come out of the stay bolts. Is there any question in your mind that when the boilermakers took the jackets off the steam locomotives to fix the stay bolts the asbestos was dusty and dirty?

[214] A The asbestos was what?

Q The asbestos was dusty and dirty during that process?

A I might have made a wrong statement.

Q Okay.

A On fixing the boiler and I remember right now, at the present time. The steam engines would come in of a evening or the early part of the night and they knocked the fire out of it and they took it around to the repair shop where this work was to be done. We drained all the water and steam off of there and it was pretty well cooled off by the next morning and the asbestos was dry at that time.

Q It actually sat and dried during the night before they took it off?

A Because the engine had to cool off before they could work on it.

Q Is there any question in your mind that the work done the entire time in the 40s to the 60s that type of work that you were doing at the Iaeger shop where you worked?

A An emergency service is what it was.

MR. BOITER: No further questions.

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TRIAL TRANSCRIPT
April 16, 1998

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[4] MR. RION: Number one, we move to when Mr. Adkins cross-examines Dr. Gaziano about other cases he's testified in, which he's certainly entitled to do, I don't have any problem in him pointing out that they weren't all railroad cases. But I think in light of the way this case has developed to point out that they were cases against the manufacturers should be excluded for two reasons, and I think we need both of these. Ordinarily, I wouldn't make this motion.

Number one, you've ruled evidence that these employees have sued the manufacturers and might have received settlement is irrelevant. That alone is not enough. Mr. Adkins stated during voir dire that these employees have sued the manufacturers and might have received money. I objected and you sustained my objection. I'm in the position of trying to unring the bell.

They've all heard the inadmissible evidence, not for evidence—they've heard the inadmissible facts through Mr. Adkins' statement. We're trying to unring the bell. If your ruling is going to have any teeth at all, if he's allowed to say what he said in voir dire and then continue to emphasize that such suits exist, [5] these folks are smart. They're going to put two and two together and figure out, oh, yeah, that's the ones that Mr. Adkins' said in here that they've sued, and I don't think there's any undue prejudice to him; so, I move in light of the fact that he did mention the inadmissible material voir dire that he be precluded from making statements that would tend to rering the bell that we're trying to unring. That's number one.

Number two, and I want to—if it's not an issue in Dr. Gaziano's testimony, it would probably be better not to argue this now; I don't know that it is. Mr. Adkins stated in opening

he wanted to introduce evidence of when the manufacturers warned as evidence on state-of-the-art. I objected to that on two reasons. Number one, 401, I don't think it's admissible. I don't think it proves a point. What they knew or what was known or knowable is one thing. The action they took or didn't take, I don't think is relevant.

Number two is more important, Rule 403. What happens when that evidence comes in? As the Court knows, I've got pretty good evidence that any failure to warn by the manufacturers—let me back up. The purported evidence would be they didn't warn because the general state-of-the-art was such that nobody knew [6] enough to do anything. That's the inference to be drawn, you know, fair enough if the jury wanted to draw it.

The Court knows that I possess testimony that would tend to rebut that, and that we have, in fact, proven to the satisfaction of jury after jury in the products' cases that the failure to warn was not as a result of the state-of-the-art being insufficiently developed, but the result of; number one, negligence on the part of the manufacturers; and, number two, intentional—or reckless misconduct.

Practically every jury that has considered the issue has said that the failure to warn by the manufacturers was due to reckless misconduct.

Now, the position that I'll put in if the evidence is to—do I just let it sit, and it's pretty powerful, to sit in alone. The manufacturers didn't know, how should the railroad know, or do I then explain to the jury through some other collateral evidence what really went on in my view, that the failure to warn of the manufacturers was not due to the insufficiently developed state-of-the-art, but due to their negligence and/or misconduct. I can't do it through jury verdicts, but I can do it through witnesses and documents.

[7] I have to do something if it comes in, Judge. I'm not just posturing. It's good evidence for him left unrebutted. If I rebut it, then under Rule 403, my view is the evidence should be stricken partly because its probative value is outweighed by prejudice, but that's the—the thrust of my argument is the other components of 403 which is, does it tend to unreasonably multiply the proceedings on collateral matters and is it likely to leave the jury confused? That's the gut of my argument is that it unreasonably—either I've got to sit and let it come in and get stuck with it, or I've got to put on my rebuttal which I think will unreasonably multiply the proceedings and confuse the jury.

I mean, what are they to do with all this and I'm not just posturing on this. I need to prove and that we're not stopped that Owens Corning, Pittsburg Corning, Johns Mansville, that Kenneth Smith told them the warn [sic] in '52 but they didn't; the documents that say, we can't say anything about cancer because it's gonna hurt sales. That's why they didn't want it. Or, at least, that's my view, that's my evidence. And, you know, I can't let him put this pretty good sounding evidence in without rebutting it.

[8] It is largely collateral, so I think under Rule 403 it should be not permitted because of that tendency to multiply these proceedings on collateral matters and then confuse this jury on, you know, what are they supposed to do with all of it, because in light they're going to have to hear all this collateral evidence about somebody else's knowledge and then there's a jury instruction that says "the duty toward the railroad workers is non-delegable."

So, really it's not an excuse, but he wants to put it in on state-of-the-arts. I think it should be not permitted. If it turns out he doesn't want to use it with Dr. Gaziano, then you could smoke this over or think this over and make your decision later, but that's my motion.

I've got one more motion on Ms. Stephens. She's begun, and I—it may be happenstance, but she's falling asleep during my testimony and waking up on cross-examination. It happened during opening and she's hearing about half of the case and ninety percent of what she's hearing is the defense. And Judge, I'm concerned enough already where I move—I move that she be replaced because she's not hearing the whole case and what she is hearing is the other side.

[9] I think Mr. Adkins would have the same concern if she stayed awake on direct and—

THE COURT: It's just more scintillating—

MR. RION: It might be. I know I drone on, and I'm not the most interesting speaker in the world, and Mr. Adkins may be more interesting, but the fact of the matter is we have alternates here and she is not hearing our case and is hearing his.

THE COURT: Or at least her eyes are open during his.

MR. RION: Yes, sir.

THE COURT: Well, where do you want to take this?

MR. RION: Yes, Your Honor.

THE COURT: Well, let me just ask; I assume the reason you present is because you ask Dr. Gaziano some state-of-the-art stuff?

MR. RION: About ten minutes worth. It's nothing elaborate.

MR. ADKINS: Well, Your Honor, I think—well, first of all, these other cases against manufacturers, it seems to me that this—I mean, if this is a reasonably intelligent jury, which I think it is, they know what's going on. So, it's no mystery— [10] that what this goes to is, which I think is relevant, is to the bias of the witness which is something that we're allowed to do in terms of who he testifies for, how

much he testifies, et cetera, how much money he makes. They do this all the time. Lawyers do this all the time.

MR. RION: But, I don't have any problem with that.

THE COURT: Well, I don't know he's going to get into the details of what his testimony has been or where he's given it in order to show that he's made some money as a witness.

MR. ADKINS: I'm not sure I understand. I mean, I'm going to ask him if he's testified in cases where manufacturers were defendants, and I think I'm entitled to do that. That's all I'm going to do, just what I do with the other witnesses—go to their bias.

MR. RION: I'm saying it should be on behalf of—plaintiffs will show the bias and not rering the bell.

MR. ADKINS: Well, I think who the defendants are is important, too. I mean, we do this all the—I don't—this is sort of—I mean, I don't even understand even that we—

THE COURT: You don't do it all the time. [11] Most of the times you're asking witnesses—for any potential bias, you ask if he's testified for the lawyers before. I don't know the last case when anybody's got into the substance of witnesses' testimony.

MR. ADKINS: What point did Mr. Rion make yesterday with Dr. Brody about testifying? Now, Dr. Brody, didn't you or haven't you testified on behalf of manufacturers of asbestos? Why did he do that? He did that because he was trying to show that Dr. Brody was not biased. I testify for plaintiffs when they ask me. I testify for defendants when they ask me. I don't understand why I have to have my hands tied behind my back when I'm doing these things, and they just want to get free rein.

MR. RION: Because he injected inadmissible material into the voir dire.

THE COURT: Well, okay, let's take the next step. Do you intend to ask Dr. Gaziano about manufacturer warning?

MR. ADKINS: Well, yes. I mean, if he figures it was state-of-the-art—I mean, Judge, that goes to—look the railroad is an inuser not a manufacturer. Now, if these manufacturers are out there having [12] conspiracies to hide information, et cetera, et cetera, the railroad doesn't know about that; and certainly it seems to me that Mr. Rion would want to use that to say that when those warnings went out, the railroad then was put on notice at that time, that there was a problem, and whether we did or do not do something then would be evidence of negligence on our part.

So, certainly this is something that's very relevant. I mean, the railroad or N & W was not a party if there was a conspiracy by the manufacturers to hide information about asbestos, not putting warnings on it. We're out here using it.

Now, to the extent that we may have an obligation to independent things, that's another issue, but certainly if we're buying from a company, products from a company, we have a right to rely on the fact that they're going to give us information, that if there's a problem they're going to warn us. It goes to our knowledge or lack of knowledge, however you want to say it, I mean, it's just sort of basic to the case.

THE COURT: They're [sic] actually two facets to that as I see it. One is that they didn't warn, so you didn't get information from that about the hazards.

MR. ADKINS: Yes.

[13] THE COURT: That's one set. So, another facet, and that's what I take it that Mr. Rion's concerned about, and that is that the suggestion that the manufacturers didn't warn because they didn't know. So, the manufacturers didn't know any more than we did and that seems to be a position that he can beat you up on.

MR. RION: But don't want to.

MR. ADKINS: This goes back to trial tactics again, Judge. I think we ought to be able as lawyers to have some rein in terms of our tactics as long as we're not violating some rule of evidence or something clearly, but this gets to, you know, what kind of argument you make based on the inferences from evidence—I mean, I don't see how you control all of that.

If we're going to have a fair situation here, where we get a fair chance to present our side of the situation, whatever it is.

THE COURT: Sure, and I understand that and am sympathetic with it to the extent that—part of it, I think is probably appropriate, but you know and I know that if you use that to create the suggestion that the manufacturers didn't know in 1971, how could you know [14] that the plaintiffs could put on a good three weeks of testimony, additional testimony, showing that the manufacturers did know. They knew all along and didn't warn them because they chose not to warn them and that's what a lawyer for Owens Corning calls a pig path. It's a deviation from what the case is all about.

I don't have any trouble at all with you saying, we didn't get any warnings from the manufacturers, and the inference from that is very simply that that was the source of information you didn't have.

On the other hand, to suggest that you didn't get any warning from the manufacturers because the manufacturers didn't know is just not true.

MR. ADKINS: Well, maybe so, I don't know. Again, that's—

THE COURT: Everybody does. Everybody knows. We tried these cases—we could probably take a poll of this jury on the manufacturers today.

MR. ADKINS: Well, Judge, if that's the case, I don't understand why we're concerned about all this. If the jury already knows, then, you know, we ought to just send them out and let them decide the case and then not put on any evidence if they already know everything about everything.

[15] MR. RION: It would seem like to me if the issue is; number one, they didn't get any warnings from the manufacturer, I'm sure that's admissible because the F—because the FELA cases are very clear. It's a non-delegable duty, so I'm not sure that they can rely on some third party.

THE COURT: But, you know and I know that the sources of information available to any employer, any large business enterprise, is pretty broad based. In this case, one of the sources of information for knowing or the ability to know are the manufacturers.

MR. RION: Well, I think if they want to bring in a N & W employee in here who will say, "one of the reasons we didn't do anything about asbestos was that we didn't get any warnings from the manufacturers", fair enough, but to take—what I think they want to do—I don't think they have that. They want, again, to retrospectively ask Dr. Gaziano, who never worked at the N & W—he's testifying about what was known. Ask him, isn't it true that the N & W never got any warnings from the manufacturers? He doesn't know.

If they want to bring in a paid consultant who will say, the manufacturers never warned until the late '60s. They don't have a shred of evidence that the lack of [16] warning on the manufacturers' products had anything to do with their conduct. This is a negligence based case.

If they want to bring somebody in to talk about that, I think that would be fair, but they don't have that person. So, instead, they want to bootstrap the evidence and argue just generally that there weren't any warnings by the manufacturers, and, therefore, they didn't receive anything. It

doesn't have anything to do with their conduct. It could and they should be able to prove that up, but I don't see where it's appropriate with Dr. Gaziano and that's what's before the Court now, and I'm not sure it's going to be appropriate. They've got one witness that will work for them, but as I understand what he said before, it's more like the manufacturers didn't know, therefore, the railroad couldn't know. They might be going to doctor it up a little bit, but I think they're going to doctor it up and get it in under the period that you—that I believe the Court's approved. I don't see any need to argue with you because I think you can make up your mind up on that. I disagree with you, but if they're going to get it in under the period that I believe you've approved, I don't see how they can bring it in as part of the state-of-the-art because you, as I understood, [17] you seemingly believe that that may be sufficiently collateral, that under 403 it should be excluded because it would unreasonably multiple [sic] the proceedings.

I think the avenues you've approved, they need—it's need to be grounded in what they received and looked at, acted on or didn't act on.

THE COURT: Well, maybe it's the appropriate time for me to ask you what, in fact, the evidence is going to show about N & W's knowledge. Are you going to put somebody on from N & W saying that we weren't warned by the manufacturer and that's why we didn't tell our employees that?

MR. ADKINS: Well, I don't need to do that. Everybody knows that the warnings—I mean, it's already in the evidence when the warning came out. So, we were warned when ever a warning came out and we've often talked of it. Why do I need to put somebody up there to tell me something that's already established.

Now, beyond that, we're getting into trial tactics again. I mean, I don't think I'm forced—this is a product, a defective product case in the sense that they're giving us a product that has a warning on it and certainly once that warning is given to us, then we have knowledge. We can't then say, we didn't have any [18] knowledge. I understand that, but up until that point, I ought to be able to have, at least, an inference from that. One of the inferences or maybe, he can put on whatever he wants to as to what we did, how we did it, and when we did it, but I ought to be able to say, this is the first time that the manufacturers warned us that asbestos products were defective.

I mean, it goes to knowledge. I mean, it's the basic issue in this case. I mean, it's the basic issue is what he's trying to say is we had knowledge in 1892, I guess, if you want to—or maybe 1492, but whatever year you want to pick. But it seems to me that you look at all these pieces of evidence to determine what the knowledge of the hazards of asbestos are.

One of them is that the manufacturers didn't warn until 1968 or whenever the date was. That's very basic.

MR. RION: That's getting back to the state-of-the-art. That general information is subject to that 403 need for collateral attack is specific concrete ground-based explanation for what they did or didn't do. It's not, but he doesn't have the horses to bring that on. That's what's going on.

MR. ADKINS: Again, you know, it's in. It's [19] basic. I ought to be able to argue it. I ought to be able ask any witness up there if they know as to when the manufacturers put warnings on asbestos products, if they know. If they don't know, all they have to say is, I don't know. If Dr. Gaziano doesn't know, all he has to say is, I don't know.

MR. RION: But if he does that, then it's an issue of what's the why to the when that I can't leave it alone.

THE COURT: I understand.

MR. RION: If he brings a N & W guy in here who says, gee, we just didn't say anything on the boxes and so we assumed it was okay, and I whip out the AAR documents and say, yeah, but you knew here, and I've done it.

If he brings a scientist who comes in and says, gee, the state-of-the-art was such blab, blah, blah and the manufacturers didn't warn, then I'm stuck.

MR. ADKINS: Well, Judge, I think we have a very good argument on that that in terms of the railway industry as what was known based on the literature and the studies in the railroad industry and that's who we are. We're not the manufacturers of it. I mean, are you saying I can't put a witness up there that's going [20] to disagree with Mr. Rion's assertion that the state-of-the-art wasn't what he says it is.

I mean, there's a big dispute about this, particularly in the railroad industry, as to when things were known. I mean, I understand you can look at the AAR documents. You can look at all that.

THE COURT: We're not going to dispute it. It's relatively clear that your company was in a meeting in the 1930s when they were told that asbestos caused asbestosis.

MR. ADKINS: There's no question about that.

THE COURT: I would suggest that you have a compelling inference that you didn't have any basis to warn because the manufacturer didn't warn until the 70s is not going to be very persuasive.

MR. ADKINS: Well, maybe not, Judge, but that's one of the pieces of evidence that I have. I understand the case is not strong on the state-of-the-art, but it's certainly there to dispute about it and I'll have a witness that's going to dispute it, and I think I should be allowed to do that.

THE COURT: So, why do you want to use Dr. Gaziano for that purpose? You asked me to cut these guys down to the limited of the number of witnesses on [21] certain facts already.

MR. ADKINS: If Dr. Gaziano is going to be offered up as a state-of-the-art witness, I think I should be able to cross-examine Dr. Gaziano about the state-of-the-art.

THE COURT: Is when the manufacturers warned state-of-the-art? Is it?

MR. ADKINS: I'm sorry?

THE COURT: Is the time when the manufacturers warned, is that an issue of the state-of-the-art?

MR. ADKINS: That's one piece of the puzzle, Judge, that we're talking about. I understand the puzzle has a hundred pieces or maybe a thousand pieces.

THE COURT: Well, to accept that, you use that to give rise to an inference that the manufacturers did not know anything until they warned, and I know and everybody else who's had any contact with this litigation knows that that just isn't true. So what that does is that that puts Mr. Rion in the predicament where he's got to put on another case, an entirely different case.

I'm going to grant the motion that is with respect to asking Dr. Gaziano when the manufacturers warned.

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TRIAL TRANSCRIPT
April 16, 1998

Gaziano Testimony

* * * *

[25] (WHEREUPON, the jury returned to the jury stand.)

THE COURT: Welcome back. Again, let me start with an apology. I had a couple of matters this morning, actually a couple I didn't even know about that took a little bit of time, and I'm responsible for the late start. I apologize.

Are you ready to call your next witness?

MR. RION: Yes, sir. We call Dr. Dominic Gaziano.

(WHEREUPON, the witness was sworn.)

THEREUPON came,

D0MINIC GAZIAN0, M. D., called as a witness on behalf of the plaintiffs after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RION:

Q. Good morning.
A. Good morning.
Q. You are Dr. Dominic Gaziano?
A. Yes, sir.
Q. Have I correctly spelled your first and last name?
A. Yes, sir.
[26] Q. All right. Where do you live, Dr. Gaziano?
A. I live in Charleston.
Q. Your age?
A. I'm 61 next week.
Q. Are you old enough where you have to think about it for a minute?

A. Yeah, actually—I worry sometimes about what I'll remember when I don't remember now.
Q. I've reached that age myself. Are you married?
A. Yes, sir.
Q. How many children do you have?
A. I have five sons.
Q. You're a doctor?
A. Yes, sir.
Q. Are any of your sons a doctor?
A. Four of them.
Q. Yesterday, we had Dr. Brody here who was a research scientist, Ph.D. doctor. You're a medical doctor?
A. Yes, sir.
Q. You're involved or have been over your career in patient treatment rather than research; is that correct?
[27] A. Yes, sir.
Q. What specialities, medical specialities, are you certified in?
A. I'm certified in Internal Medicine, Pulmonary and Lung Disease and Critical Care Medicine.
Q. Are you Board certified in all three of those specialities?
A. Yes, sir.
Q. Has everybody who practices in internal critical care in pulmonary medicine, do they all have to be Board certified?
A. No, sir.
Q. But you've taken a special test to prove your certification in those areas?
A. Yes, sir.
Q. How many doctors in West Virginia to your knowledge are triple Board certified in internal and in critical care and pulmonary medicine?
A. Mr. Rion, I really don't know. At one time, there wasn't that many, but I think there's several now.

Q. Does critical care medicine relate to your pulmonary medicine specialty?

A. Yes, sir. As it's so involved, critical care medicine is a relatively new specialty and as it [28] evolves, the pulmonary doctor was the one who was involved in the intensive care unit managing people on respirators or breathing machines and from that position, they had to learn all aspects of critical care, which is largely intensive care work, and so, most intensivists as critical specialists are called, go through the pulmonary pathway.

Q. Did you play any role in starting the critical care section here at CAMC?

A. Actually, I had a very important, a very fundamental role, in the establishment of the critical care unit at CAMC in the 80s. I was Director of that particular division that had set up and established intensive care units at General Memorial in the 80s when they were coming of age.

Q. Dr. Gaziano, have you in the last couple of years suffered from a heart attack?

A. Well, not a heart attack. I had angina about three years ago. It was on my birthday, April, and I had an angioplasty, and it didn't work and five weeks later I had to have it redone, and it did work the second time.

Q. Since that time, have you retired from active patient care?

[29] A. I've tried to retire. I've tried to slow down after that happened, but it's difficult. So, as of October, I've given up clinical practice.

Q. So, you gave up your clinic practice in October of 19—?

A. '97.

Q. '97. So, let's go back. How long were you in the active clinical practice of medicine here in the Kanawha Valley? When did you come here and begin practice?

A. I started in '69 to '97.

Q. So, almost thirty years?

A. Yes, sir.

Q. What type training did you undergo before you came here to Charleston in 1969 to begin your practice? Just tell us about your medical training.

A. All right. I graduated from West Virginia University in Premed in 1958 after four years. Then I went to the Medical College of Virginia and graduated from MCV in 1962. In 1962 to '63, I stayed in Richmond and was an intern. From '63 to '65 I was in the Army as a medical officer in New Hampshire. '65 to '68, I was back to WVU in Morgantown in an internal medicine residency program, and then '68 to '69, I had a year [30] fellowship in Liverpool, England and studied lung diseases.

Q. That was one year?

A. One year, yes, sir, and then I came to Charleston in completion and began practice.

Q. Over the years you spent here in clinical practice, '69 to 1997, did you attempt to limit your practice to the diagnosis and treatment of any particular type diseases?

A. I've been a specialist in lung diseases essentially and all the ramifications of lung diseases, which are lung disease in individuals and also a segment of my practice has always been occupational lung disease.

Q. A lung disease caused by a job?

A. By work, yes, sir.

Q. What type occupational lung diseases, just briefly, have you been involved in since you've been here?

A. Well, practically all kinds we see in West Virginia; coal—coal worker's pneumoconiosis or black lung; silicosis, asbestos, asbestosis, and industrial asthma or various bronchospastic conditions, occasional trauma of lung or chest wall injuries. Those are the [31] major areas.

Q. What percentage over the years do you believe was, say, devoted to occupational lung disease?

A. I had a significant portion always from the very beginning. The Federal Health and Safety Act in 1968—I

was right in the middle of black lung assessment. So, anywhere from thirty to fifty percent.

Q. All right.

A. Over the years.

Q. Then other fifty percent of your practice was devoted to treating and diagnosing what type lung diseases?

A. Well, mostly people who have emphysema, chronic bronchitis, asthma, lung cancer and various other less common causes of lung diseases, as well. I've treated people who have Black Lung and asbestos disease.

Q. What hospitals have you worked at and held privileges at here?

A. I've had privileges at CAMC and when I came in, there were two divisions, two hospitals and then they combined. So, it's been essentially the same hospital, General and Memorial and Women's and Children and Mountain State.

Q. Could you tell us some of the positions you've [32] held at CAMC?

A. I was Director of the Respiratory Therapy Department for many years. I was Director of the Intensive Care Unit as I mentioned early on. I came after a few years here, and I gave that up after about fifteen years.

Q. You mentioned you got the Intensive Care Unit or was it the critical care unit, or at least the critical care portion of that?

A. Yes.

Q. Continue on, sir.

A. I was Chairman of the Department of Internal Medicine. I was Chief of the Pulmonary segment for a number of years. I was Chief of Staff for one year. I've been selected to head a number of committees of which I just haven't put in CV over the years as it relates to certain evolutionary problems within the hospital. I was the Medical Director of the Respiratory Therapy at the University of

Charleston from its inception. I helped start it and I remained the Medical Director of the Respiratory Therapy Department.

Q. Have you also been involved in teaching medical students?

A. Yes, sir.

[33] Q. Do you do that in classroom lectures or do you do that as clinical on-the-job teaching?

A. Well, actually I have taught students and residents and basically what they do, they rotate with me on my clinical care patients on a monthly basis.

Q. Do they come from West Virginia University?

A. Some come from West Virginia University, some come from Marshall and some come from the osteopath school.

Q. So, they worked with you on the job in clinical practice to learn the practical aspects of medicine?

A. Yes, Sir.

Q. Have you been or are you still a member of the West Virginia Thoracic Society?

A. I am.

Q. Thoracic simply means chest?

A. Yes, Sir.

Q. Have you been president of the West Virginia Thoracic Society?

A. Yes, Sir.

Q. Is there an American Lung Association of West Virginia or West Virginia Division?

A. Yes, sir.

[34] Q. Are you on the Board of Directors of the West Virginia Division of the American Lung Association?

A. Yes, sir.

Q. I don't mean to force you to brag on yourself too much, doctor, but this—in court, you're supposed to go through your qualifications so that the jury can judge your professional qualifications and abilities. Is there a book published on the best doctors in America?

A. Yes, sir.

Q. For 1996 and 1997, were you listed among the best doctors in America in that book?

A. Yes, sir.

Q. You got an award one time didn't you, Doctor, called the William L. Cook Award?

A. Yes, sir.

Q. Tell us what that was for?

A. The American Lung Association of West Virginia every few years will give an award to somebody as it relates to contribution to lung disease in this region, in this area, in West Virginia, and I got it in the '80s or early '90s.

Q. Was it any particular part of your work you got that for, anything in particular that you'd done?

[35] A. Well, I got it about a year after I was the co-producer of a commercial video, *Tobacco Road Dead End*, which was used in a number of school programs and the Lung Association itself took that to many schools talking about the health consequences of tobacco.

Q. You've been active in trying to keep kids from smoking?

A. Very much so.

Q. Are you a big opponent of smoking?

A. Smoking is dangerous, very dangerous, so I certainly and am probably more now. I'm probably an evangelist against smoking. If you give me one other person, I'll get up and give you a lecture on it of the health consequences of smoking.

Q. Have you diagnosed literally thousands of people with smoking related diseases?

A. Yes, sir.

Q. Do you have any hesitation—these cases are going to involve as we get into them some debate about whether smoking versus asbestos or some combination is causing various breathing problems. I think you understand that from having looked at the individuals, don't you?

A. Yes, sir.

[36] Q. Do you have any hesitation where you find it to blame tobacco for hurting someone?

A. No, sir. I can recognize tobacco related disease easily.

Q. I guess that was the question. In addition to the interests and concerns you have about tobacco disease, I think you mentioned that you have a particular interest in occupational or job-related lung disease; is that correct?

A. That's been an important part of my practice.

Q. When did you first acquire this interest in diagnosis and treatment of—to the extent there is treatment of occupational lung disease?

A. Well, actually I—the interest is a matter of what I'm supposed to do. In my training, I was taught the part of my medical training in pulmonary residency and fellowships about occupational lung disease, so that was a part of my background and training and having come to Charleston, West Virginia, which was a place where there was abundant occupational lung disease, it was natural that I would see a significant amount.

Q. You mentioned you've seen disease in coal miners?

[37] A. Yes, Sir.

Q. People who have worked around silica?

A. Yes, Sir.

Q. Asbestos?

A. Yes, Sir.

Q. Has there been over the years, doctor, an union in West Virginia called the Asbestos Workers Union that were insulation workers?

A. Yes, Sir.

Q. Did you do any work with the Asbestos Workers Union and their membership and the possibility of asbestos disease in that union?

A. Yes, I think that was an important part of my getting interested in asbestos in the early '70s, very early '70s. I suppose in '72, I was asked to be a—to evaluate and monitor

and follow insulators from the Local 80 of the Insulators Union which consisted of eastern Ohio and West Virginia in solving asbestos involving approximately 150 men at that time who were ,insulators.

Q. Did you find disease in that workforce?

A. Yes, Sir.

Q. Did you publish an article about your findings in following that union?

[38] A. Yes, sir. Doctor Ballog who was a fellow working under me and I published a recent article in the West Virginia Medical Journal.

Q. What was the title of it?

A. I believe it was *Asbestos Lung Disease In West Virginia and Eastern Ohio*, but I haven't looked at it in years.

Q. To your knowledge, has anyone else published an article in the medical and scientific literature specifically on asbestos disease in West Virginia?

A. I don't know of any, no.

Q. Doctor Gaziano, are you certified through the De[partment] of Labor—excuse me, it would be certified through [the] International Labor Organization as a specialist in reading [x-] rays for signs of dust diseases?

A. Yes, sir.

Q. Tell us about how you acquired that certification and what it is?

A. Well, it's the examination of learning how to—not learning. It's a learning, too, of your competency in reading x-rays of people with dust diseases. It's sponsored by the federal government, by NIAGE, and it's given in various places periodically. Most of the time, it's given in Morgantown because [39] there's a big center there or maybe nationally it's at various conferences and what it involves is, you're given 80 x-rays to read in a period of time to read it in, and then you read it for pneumoconiosis or dust disease and for any other disease you find on it; and then after you take that exam, you're graded and if you pass, you get a certificate

that says you're a "B-Reader" and qualified under this program to read x-rays for dust diseases. And that certification lasts for four years and then you have to retake the test.

Q. Do most doctors who take that pass or fail?

A. Well, about half pass and half fail. The pass rate is anywhere from—the past rate anywhere from 60 to 60 percent. Some years it's better than others.

Q. You were first certified in what year? If you have to look at your CV I think you've got it.

A. I think you've got the CV because I don't have it in front of me.

Q. It says right here "certified as "B-Reader" 1981", does that sound about right?

A. That's about right, yes, sir.

Q. You're still certified today?

A. Yes, sir.

Q. Over the years, Doctor, have you read [40] literally thousands of x-rays to determine whether any type of dust disease was present on the x-ray?

A. Yes, sir.

Q. Has the U.S. Navy asked you to act as a consultant and specialist in reviewing of x-rays for the Navy to determine whether Naval employees show signs of asbestos disease?

A. Yes, sir.

Q. Have local law firms, including, for instance, Mr. Humphrey's office here, asked you to review x-rays for signs of asbestos disease?

A. Yes, sir.

Q. Have local industries ever asked you to do evaluations of their workers to see if there is any signs of occupational lung disease in employees?

A. Yes, sir.

Q. Let's talk a minute about that. Could you, Doctor, tell us the names of some of the industries who've asked you to evaluate their employees for signs of dust disease?

MR. ADKINS: Your Honor, could we approach, please.

THE COURT: Okay.

(WHEREUPON, a discussion was had at the [41] bench out of the hearing of the jury)

MR. ADKINS: Your Honor, the specific point I was trying to make earlier about, you know an even playing field. You know, he can go far afield to establish that his witness is not biased because he testified. But the Court if not permitting me to do that when I do cross examination of these witnesses and I think we can't have it both ways. I just want a level playing field.

MR. RION: I've got one comment. The only difference is inserted clearly, irrelevant material into this proceeding in the beginning. The reason I've asked for this—if that hadn't happened it would be fine, but there ought to be some consequence for what he did.

THE COURT: Where are you going with this?

MR. RION: Just the names of people in the industry who do evaluations for DuPont, Union Carbide.

MR. ADKINS: Just so the record is straight, I think it's irrelevant.

MR. RION: I'll just move on now. I have to get the names.

(WHEREUPON, the bench conference was completed and examination continued)

BY MR. RION:

[42] Q. We're not going to go through the names of them, Doctor, but you've done evaluations for local industries?

A. Yes, sir.

Q. In addition to just reviewing x-rays for signs of diseases, have you over the years evaluated hundreds of workers to see—or would you say it would be more than hundreds to see if there's signs of dust disease?

A. It would be more than hundreds.

Q. Thousands?

A. Thousands, yes, sir.

Q. You mentioned that the work you did in doing the film in the school to persuade not to smoke, have you done any other work in the community against smoking?

A. Yes, sir.

Q. Tell us a little bit about that?

A. Well, I personally have gone to schools a few times. I have talked to some hospital sponsored seminars on smoking cessation. I have been a participant on panels of that kind and I've gave many lectures at the hospital about cigarette smoking and its health effect.

Q. I think that covers your professional [43] experience and qualifications. I'd like to ask you if Plaintiff's Exhibit 4 is an accurate copy of a summary of your qualifications?

A. Yes, sir.

MR. RION: We move Plaintiff's 4 to be received.

MR. ADKINS: No objection.

THE COURT: It will be received.

(WHEREUPON, the document previously marked for identification as Plaintiff's Exhibit No. 4 was received into evidence and made a part of the record herein.)

BY MR. RION:

Q. Dr. Gaziano, before we get to your opinions about each of these individuals, I've got a few general questions about asbestos disease and I want to try to cover without going back over what we heard yesterday. So, I just want to tell you, generally, we heard yesterday what asbestos is, how

it gets in the lungs, what asbestos is, and a little bit about cancer risks from asbestos and I wanted to ask you just a couple of follow-up questions to add to our general knowledge of asbestos, and then we'll go the individual workers. Fair enough?

[44] A. Yes, Sir.

Q. All right. In your experience in following workers here in the Kanawha Valley with asbestos, in your opinion based on your experience, is asbestosis curable?

A. No.

Q. Is there any effective treatment for asbestosis?

A. No.

Q. In your experience, can asbestosis be progressive?

A. Yes, sir.

Q. By progressive, what do we mean?

A. That it could get worse over time.

Q. Can it get worse even while workers no longer are exposed to asbestos?

A. Yes, sir.

Q. Now, in your opinion, can asbestosis be fatal?

A. Yes, sir.

Q. How can it be fatal?

A. Asbestosis can destroy the lung and if it destroys a sufficient amount of the lung, it can be fatal or if it destroys a significant portion of the lung, and you develop a respiratory infection, it makes [45] you least likely to survive that.

Q. All right. Now, does everyone who has asbestosis always develop progressive disease and die?

A. No.

Q. Do many people have asbestosis and not progress?

A. If it doesn't progress clinically, yes, sir, that's correct.

Q. Now, do you have any guidelines you've used in trying to come to grips with in your opinion which patients do progress and which patients don't progress?

A. Yes. I, yes, I refer to what the literature says about that and there is clearly some who don't progress and I've

learned from my own experience following people now for several years, that those who are late in their work history or retired and who have no significant impairment, that's the group that tends not—say, you're sixty years old and you have asbestosis and you don't have any impairment, I've followed some of these people yearly or every other year, and I've found that many of them don't progress.

Q. In the stages of asbestosis, at what point do you believe it becomes likely that a worker is going to develop significant progression?

[46] Let's start with and I'm kind of going to write here when it becomes visible on x-ray. Is there a period before you can see asbestosis on x-ray that it exists in the lung but's not visible by x-ray?

A. Yes, sir.

Q. I'm just going to put pre-x-ray here. So, a worker can have the disease in his lung, but still be at a stage that it's not detectable?

A. Yes, sir.

Q. At some point it progresses to the point that you can see it on chest x-ray, correct?

A. That's one way to detect it.

Q. All right.

A. Another way is to detect it—

Q. We'll get into all the various tools that you use. Is it possible for a worker to have asbestosis that's gone just in the lung tissue not visible on x-ray that it gets to the point that you can see it on x-ray, but it still has no measurable impairment by breathing test?

A. Yes.

Q. So, I'm going to write here, no measurable—I'm going to abbreviate that, impairment. Now, these folks here who progress from the pre-x-ray to the x-ray [47] stage, when I say no measurable impairment, in shorthand we simply see their breathing tests where they blow into a tube and you

measure the amount of air and the diffusing capacity, all that is still normal but their x-ray is abnormal?

A. Yes, sir.

Q. Okay. Now, are these folks with the mild x-ray changes and no measurable impairment, are they still at risk for cancer?

A. Yes, sir.

Q. All right. We're talking right now—let's keep on the subject, not of cancer but of progressive impairment from the asbestos itself. Now, at some point—if I took a 100—let's say, if we took a 100 of these guys who had x-ray changes and no measurable impairment, if you were to talk to each one of them individually and they would say, "Dr. Gaziano, am I likely to progress to the point where my shortness of breathe gets noticeably worse?" As I understand what you're saying, you would probably tell each individual the odds are, you probably won't?

A. Well, I would tell the individual one of two things. If they're well advanced in age and that's the situation I them [sic], I tend to reassure them and tell them [48] that as far as asbestos it's probably—you're probably not going to have a significant problem, and I do that all the time. If they're young enough and still employed, where I consider that to be a stage in which, you know, I don't know what's going to happen.

Q. You tell them you didn't know?

A. I don't know. It could get worse over the years. If you come back in twenty years, I'll see what's happened to you, or ten years or so.

Q. Let's say, even if we had a 100 older men who were retired who had no measurable impairment, you would tell them that the odds were in their favor?

A. Very much so.

Q. Of no progression?

A. It's very much in their favor, yes, sir.

Q. On the other hand, out of 100 those, you'd be wrong about some, wouldn't you?

A. I'd be wrong about some.

Q. Some would go on to develop both x-ray and measurable impairment, right?

A. Yes, sir.

Q. Now, in other words, the breathing tests have become abnormal, just we have some idea about these breathing tests. Is it true that you can have lung [49] surgery and say a lobe of your lung can be removed through surgery and you might still have normal breathing tests?

A. Yes, sir.

Q. So, you can have lung surgery, lose a good portion of the lung and still have no measurable impairment?

A. If you used the standard references that we use, that's the case. If you use your own self as a reference, if you have a breathing test before you have the surgery and then you repeat your own later, you'll find it less.

Q. That it went down?

A. But it could be still be within the normal category, normal range.

Q. Right. Now, once someone has gone from this pre-x-ray stage down to its developed enough that you can see it on the x-ray and there's no impairment, and then it goes on to develop both x-ray and impairment, what is your opinion about those folks and their chance of progression?

A. I would say that it's likely that they would progress. Again, I follow individuals in that way and I notice that most of those who have significant or [50] measurable impairment progress and that's just about—not just for asbestosis, but most lung diseases. Actually, that's almost even for emphysema and bronchitis. Once they get a certain level of impairment, it tends to progress.

Q. All right. That's all I wanted to ask you about general information about asbestosis that we haven't already covered.

Just a couple points. Are the diseases we talked about yesterday, Doctor, mesothelioma that's a form of cancer of the lining of the lung caused by asbestos, a couple of questions about that. Have you treated mesothelioma patients?

A. Yes, sir.

Q. In your experience, is mesothelioma curable?

A. No, sir, it isn't.

Q. Sometimes or not very often?

A. You know they're doing studies at Hazard and, I believe, in Baltimore, in which they're doing aggressive treatment and the results are coming out, there is a small group of survivors of five years, a relatively small group, maybe ten percent. Most people die of it and no one—it's almost considered a universally fatal disease because you can't take it out [51] because of its location. You'd have to take out the whole half of your chest to get rid of it and nobody can live with their whole chest wall removed. That's the basis for it being incurable, but there is a few cases that are living longer and whether they're truly cured or not remains to be seen.

Q. Give us some idea. Is the cure rate above or below one percent?

A. I would have said a few years ago, it was probably one percent. Right now with the current information, I would say we're seeing some long survivors of about five to ten percent.

Q. Is it generally a painful disease?

A. Very painful, yes, sir.

Q. What type of asbestos exposures in your experience can cause mesothelioma?

A. All kinds of asbestos exposure can cause it.

Q. Have you, Doctor, diagnosed mesothelioma in persons whose only exposure was in the household by contact through a family member's clothes who had a on-the-job exposure?

A. I believe I've had one case. I'm a little vague. I know it's in the literature and I've seen several mesothelioma with

quite insignificant exposure [52] to asbestos. I'm not quite sure whether I can—but it does occur.

Q. Okay. Is it reported in the literature that family members whose only contact with asbestos is some other family member's clothes can get mesothelioma?

A. Absolutely. That's well documented.

Q. Of all the asbestos diseases; asbestosis, lung cancer and mesothelioma, is it true that mesothelioma takes less exposure than any of the other diseases?

A. Yes, sir.

Q. Have you, Dr. Gaziano, diagnosed cases of—do you have experience in diagnosing cases of asbestos disease in railroad workers here in West Virginia?

A. Yes, sir.

Q. How much experience do you have in that area?

A. A lot.

Q. Have you interviewed railroad workers about their exposure?

A. Yes, sir.

Q. What's been your assessment after interviewing a large number of railroad workers about the type of exposures you had in the railroad industry in the 1940's and 1950's in terms of whether it was heavy, light or what type of exposure?

[53] A. That depends to a great extent on what kind of work or where they were working. There are some areas that actually the dust is the worst place for asbestos in the country and that's called a back shop of steam locomotives refurbishing. Basically, what happens is that the long shed which the engine is pulled into and periodically and I don't know how many years, all the asbestos is stripped—actually the steam engine is nothing more than a boiler wrapped in asbestos, if you can imagine that, with some steel and iron for structure and iron wheels. But basically all the asbestos when it goes through that, it's stripped from the boilers, stripped from the lines, stripped and, actually, it's not even—.

The railroad industry made use of their asbestos. They didn't throw it away. They collected and ground it up and reprocessed it and put it back on and mixed it with a wetting agent so that it could be reapplied. And everybody in that shed had a very intensive exposure to asbestos. The machinists, the people who lagged the pipes, the labors [sic], the pipefitters, plus—and the sheet metal workers all had very intensive exposure.

Then there was an area that has considerable [54] exposure, less but considerable, and that's the roundhouse where the engine is brought in and it's an interesting construction device. I think the railroad industry was very clever in the way they worked these. Then there's six or seven or eight bays. I've never been in one, but I've seen photographs in which an engine goes back and is brought into a bay and less intense maintenance is done there. Again, asbestos is stripped and repairs are made and reapplied, and then there's another area—

Q. Now, talking about those roundhouses. Is what the workers in your experience sometimes called running repairs?

A. I believe so, yes, sir.

Q. Have you ever heard that term?

A. Yes, sir. I think, you know, a minor repair when maybe it's still on the line but it's out for a few hours, a few days. I don't know the specifics.

Q. But they still take pieces of the jacket off where the asbestos can be exposed?

A. Right.

Q. A lot of the workers here, I believe, have talked about running repairs.

A. Well, the other place, I think, is the steam [55] engines, people who ride in the cabs, ride the steam engines and actually rode the diesels until fairly recently. There was a lot of asbestos even in diesel cabs, but the cabs are open and the inside of the cabs were insulated and with the vibration

there's always airborne being generated and also coming in from the wind and in the diesels there was less, but some of these types, electrical apparatuses were insulated and in the passenger engines, the water was heated and insulated, the water tank was heated and insulated and that was in the engine and it brought hot water back to the passenger cars. So, those are the principal—

Then there are other less intense as any kind of occupation operating certain kinds of things like clamps and these things that had open brakes, open bands, open clutches, they weren't concealed like in automobiles and, also, the shops. Every shop was insulated to varying degrees. It's open pipes and some of the walls and ceilings were manufactured, but in the specific case, I couldn't tell you unless you had some intimate knowledge.

Q. So, this is what you've learned from interviewing workers?

A. Yes, sir, and reading about it.

[56] Q. Then reading, okay. I want to get as quickly as I can now into the evaluations you did on each of the individuals here. I saw where I want to go now.

Did Mr. Pauley's and Mr. Humphrey's office, who with us represent, these gentlemen send them to you for you to do an evaluation about whether or not they had any dust disease?

A. Yes, sir.

Q. That's something you've done many times at the request of a lawyer?

A. Yes, sir.

Q. When you get a case from a lawyer, do you sometimes find there's dust disease present?

A. Yes, sir.

Q. Do you sometimes find there's no dust disease?

A. Yes, sir.

Q. In either case, you write a report to the lawyer and tell them what you found?

A. Yes, sir. Often times I may just screen x-rays and not—if the x-rays are negative, then they're not even examined.

Q. Was your bill the same whether there's disease present or not?

A. Yes, sir.

[57] Q. Okay. I want to talk before we talk about each individual, I'll ask you is the workup you do when you're trying to determine if asbestos disease is present, do you do and did you in these cases somewhat or identical exams on each individual?

A. Yes, sir.

Q. What I want to do is just for everybody layout what it is you're looking for in trying to diagnose dust disease or feel there is present, we'll cover it once. That way we won't have to cover it with each individual.

So, I guess—you said you interviewed the workers when they came in, correct?

A. Yes, sir.

Q. That's called taking a history?

A. Yes, sir.

Q. Is the history of exposure to dust one of the factors?

A. That's very important. It's essential, actually.

Q. One, we have to have—I'm going to abbreviate history, HX, history of exposure. Now, do you need every detail of every year of exposure or do you want to have just enough information so you'll know that there's a possibility that they have enough that [58] you need to go on looking at other more objective clinical tests?

A. Well, I think—first of all, it's impossible to get a detailed daily, so basically you want to get a good understanding of their work to give you an idea of whether it they could potentially could have an occupational lung disease. So, history of exposure is very important and to generally get the occupation is important.

Q. You can have a history of exposure and still have no disease?

A. Yes, sir.

Q. All right. So, everybody with a history of exposure doesn't necessarily have disease, you've got to look further?

A. Yes, sir.

Q. Now, for example, we've heard if I started working in asbestos today and you were to see me tomorrow and I were to ask you if I had a disease, what would you tell me?

A. That I don't know. It's too early to tell.

Q. As Dr. Brody told us yesterday that you have to have a latency of decades before you can have a disease or at least a period of years?

[59] A. Yes, sir.

Q. Is that something you look at in your evaluations?

A. Yes, sir.

Q. Of course, you can have a history of exposure and have a latency and still not have disease, can't you?

A. Yes, sir.

Q. All right. Let's get to—I'm going to draw a line here. This is sort of soft information you get from talking to the individual, right?

A. Right.

Q. I'm going to draw a line here and then have you tell us the hard, clinical, medical stuff you look at in trying to tell whether disease is present. You kind of have to get to this—before the medical stuff is even important, you have to get to this, right?

A. Yes, sir.

Q. What objective medical tests—

A. Are you talking about tests or are—

Q. Everything.

A. Tests like examinations?

Q. Yes.

[60] A. I thought that it's important.

Q. Exams. What would you look for there?

A. Well, you look for scars if they're having breathing difficulty and, again, part of the history is history of respiratory symptoms and then when they have certain physical findings such as enlarged ends of the fingers called clubbing or certain sounds in the lungs. It sounds like crate paper we call a rales.

Q. Do you use a stethoscope?

A. A stethoscope and you listen to the chest, and then we also look at the pulmonary function tests and the chest x-ray.

Q. So, you have the exam and chest x-ray?

A. Yes, sir.

Q. And the breathing tests?

A. Yes, sir.

Q. For example, can someone have asbestosis and not have the clubbing of the fingers that you've talked about?

A. Yes, sir. That's relatively uncommon. That's in the far advanced stage.

Q. Some do and some don't?

A. Yes, sir.

Q. How about the noises in the chest?

[61] A. Some do and some don't. That's more common than the clubbing.

Q. How about the chest x-ray, is that always required or usually required?

A. For me, it's almost always required although I will make a diagnosis of asbestosis if they have many of the other features and there is no other explanation for what I find.

Q. So, are you saying that almost always except for some exceptional circumstances?

A. Yes, sir.

Q. Then, abnormality in the breathing test, I think we covered earlier, you can have the disease before you develop the impairment measured by these?

A. Yes, sir.

Q. Breathing tests, when we're talking about measurable impairment, that's what breathing tests are used to determine?

A. Yes.

Q. One last thing about your exam that I want to cover before we get to each individual is a test in your records called the diffusion capacity. What's the abbreviation for that?

A. DLCO.

[62] Q. First of all, tell us what it is?

A. Well, it's a test—it's a certain type of test in which an individual is asked to take in a deep breathe of a gas that has a very dilute solution of carbon monoxide and this gas—they are asked to hold their breathe somewhere around eight to ten seconds and then they are asked to blow it all out. The amount of carbon monoxide that's in the gas is known and the amount of carbon monoxide that's in the gas as the patient blows out you collect a last small amount that's there and then you—it's a rather complicated calculation that actually the computer does for us, happily. You can determine how much carbon monoxide is taking up and that's a rough estimation of the surface of the lung that's involved in transport of oxygen and carbon monoxide and that's called the carbon monoxide diffusion test or diffusion capacity.

Q. Dr. Brody told us yesterday that that was an indirect measure of how much of the ability of your lungs to move oxygen from your air sacs into your blood system, is that roughly right?

A. Yes, sir, what your capacity is in terms of surface area.

Q. Now, there's a certain figure that's [63] considered normal for that, correct?

A. Yes, sir.

Q. Is that adjusted depending upon your age?

A. It's adjusted for age, yes.

Q. So, you have a table that says, for your age you should be able to do a certain amount?

A. Yes, sir.

Q. Now, if you're anywhere below that target figure, is that considered abnormal?

A. Yes, sir.

Q. I mean, if the target figure is 100 and it's 99, do you look—

A. Well, actually the normal is a range of 81 through 120 is the normal age.

Q. So, you've got a figure that's normal, we'll just call that X depending on your age, right?

A. Yes.

Q. Anything from 80 here below to 120 percent above or 81—

A. 81 to 100 is considered normal.

Q. Eighty-one to a hundred—

A. Twenty or whatever. Anything above 81 is considered normal.

Q. Anything above 81, so you've got to get at [64] least 20% below the normal range before you're considered abnormal?

A. Yes, sir.

Q. When they take the population of people on all these things that they study to set these tables, is it true that roughly 95% of the population studied will fall within this normal range?

A. Yes, sir.

Q. Now, the tables that you use in your evaluation are designed by who?

A. Crapo—Morris.

Q. Did you notice in reviewing the records of Dr. Renn who did evaluations for the railroad here that he apparently uses a different table than you use for diffusion capacity?

A. Yes, sir.

Q. Whatever table he uses predicts that the normal is lower than what Crapo and Morris predict, is that correct or a higher?

A. Lower.

Q. So, he's finding people based on his tables—he's saying they're normal where you're saying they're abnormal, correct?

A. Yes.

[65] Q. All right. Now, in—if you go to the AMA Guidelines for Permanent Impairment published by the American Medical Association, what standard did they use for the diffusion capacity?

A. They use Crapo and Morris.

Q. That's the same one you use?

A. Yes, sir.

Q. So, you're using the same one the American Medical Association is and Dr. Renn is using some other standard, and you're not saying there's anything wrong with Dr. Renn's?

A. No, sir.

Q. Just a different standard. Now, have you over the shared years with another pulmonologist here in town?

A. Yes, sir, I have.

Q. What's his name?

A. George Zaldivar.

Q. Does Dr. Zaldivar do asbestos disease evaluations?

A. Yes, sir.

Q. Does he typically do them for the defense?

A. I believe so, yes, sir.

Q. So, even though you all are partners, you've [66] done them more for the plaintiff's lawyers and he's done them more for the defense?

A. Yes, sir.

Q. Have you and Dr. Zaldivar, even though you're doing evaluations for different sides, agreed on what the standard in your laboratory should be for diffusion capacity as far as which you should use?

A. Yes, sir.

Q. What did you agree on?

A. Crapo and Morris.

Q. In agreeing on that, did you and Dr. Zaldivar do any independent research to determine whether Crapo and Morris would be a proper table to use?

A. Yes, sir, we did diffusion on several normal people and sent it in with—bought several of the tables and found that the normal people, Crapo and Morris would hit a 100%, plus or minus ten and that was the basis for selecting that.

Q. So, you and Dr. Zaldivar actually ran people through your lab and evaluated whether Crapo and Morris or some other table most accurately seemed to meet this 95% requirement?

A. Yes, sir.

Q. We went through what you look at; history, [67] latency, physical exam, x-rays and breathing tests. Did you do the same workup looking at all these factors on each of these six gentlemen?

A. Yes, sir.

THE COURT: Is this an appropriate time to take a break?

MR. RION: Yes, sir. I'm ready now. I'm ready to talk about each evaluation, and I think it will go quicker now that we've got all the—

THE COURT: We'll take a recess first.

(WHEREUPON, a short recess was taken after which the following proceedings were had.)

THE COURT: Are we ready?

MR. RION: Yes, sir.

BY MR. RION:

Q. During the break, Your Honor, I thought of one more general point I want to cover and then we'll get to the examination of each person.

This goes back to this diffusion test. You said the abbreviation is DLCO, correct?

A. Yes.

Q. What does the term—if you see on the records DLCO diffusion capacity/VA?

[68] A. That means that the diffusion is corrected for alveolar volume.

Q. That VA means alveolar with a volume?

A. Yes, sir.

Q. Even though the A is second?

A. Right.

Q. You've got it backwards. What is alveolar volume?

A. That's the number of sacs, air sacs, that are in the lung and the volume of them.

Q. So, this is called—does this got something that goes after it?

A. No.

Q. Is this called the—

A. Single breath.

Q. The single breath?

A. Yes. It's the DLCO.

Q. Single breath, all right.

A. You can do it other ways, but we—everybody has examined these individuals and seen the breath test.

Q. All right. So, you have DLCO and DLCO/VA?

A. Yes.

Q. If it says it's corrected for alveolar volume, does it mean this one's right because it's corrected and [69] this one's wrong because it's not corrected?

A. No, sir. It's something with entirely different meaning.

Q. Well, what does it mean?

A. Well, the one that means what capacity or function you have is the DLCO.

Q. This one? (indicating)

A. Right, and that's the one that's used for all disability tables. Social Security uses the top one. AMA Guide uses the top one. They don't use the corrected—the reason for that is that's what determines how much work you can do. That's

determines if you can do 50% at a DLCO of 50%, then that means you can do 50% of work.

Now, when you correct for alveolar volume, that's a technique in which you wanted to know whether the diffusion is lower because the lung volume is less or because there's thickening around the alvei. So, if it tends to correct and actually most people with asbestos disease, the disease is caused by loss, scarring through and destroying lung, so it will correct up to a great extent. In any event, if you correct for alveolar volume that means a rough reference to how much actual lung you've lost rather than how much lung you have [70] that's functioning less than—

Q. Let me use an example. Let's take a person who's got two perfectly healthy lungs.

A. All right.

Q. Let's assume that they score 100% on the DLCO?

A. Right.

Q. Then let's have—this person has lung cancer throughout an entire lung and we have to remove an entire lung.

A. Right.

Q. So, this person is left with only one lung.

A. Right.

Q. Is this person probably going to be impaired from work?

A. He's going to lose half of his lung function, yes?

Q. So, his DLCO single breath would probably be—if he was 100% and he loses one lung would be in the 50% range?

A. It would be about 50, right.

Q. So, he would be in the 50% range, plus or minus depending on the lung size. On the other hand, if you did a DLCO corrected for alveolar volume, where would it be?

[71] A. The DLCO would be a 100.

Q. So, he would be a 100% on this, on the corrected score?

A. Right.

Q. If you wanted to look at—because your alveolar volume simply amount of lung?

A. Right.

Q. So, if you correct for the amount of lung—is one lung working okay?

A. Yes, sir, that's right.

Q. But if you want to look at whether he has symptoms and impairment you would look at the single breath which shows he's got some pretty substantial impairment?

A. Yes, sir.

Q. All right. I'm sorry to keep meandering on these things, but—okay.

Now, Mr. Vance. What I'm going to try to do, Doctor, is put up some photographs of each individuals so we can put up so when we talk about different gentlemen, everybody will be able to know who we're talking about.

You saw Mr. Vance at the request of his lawyers?

A. Yes.

[72] Q. Mr. Humphrey's and others. That's true, and I will repeat that. Each one of these individuals that's the truth of it, correct?

A. Yes.

Q. If you want you can find your records on him and we'll—

A. I have them.

Q. When did you see him?

A. I saw him twice. I saw him on 12/2/95 and 11/15/97.

Q. Okay. How old was he when you saw him in '95?

A. He was 74.

Q. All right. Tell us what you discovered in your interview and history?

A. That he was 74 and that he had worked for the Norfolk & Western Railroad from 1942 to '81. He worked in repair shops to repair engines—for the repair and refurbishing. He was exposed to asbestos working in these areas

where asbestos was supplied and removed and also cleaning up asbestos as a laborer. This was in the handling of steam and subsequently diesel locomotives. He retired in 1987.

Q. Now, that's the extent of the details that you have on his exposure?

[73] A. Yes, sir.

Q. Is that about what you would need and expect before you move on to the more objective clinical tests?

A. Yes, sir.

Q. Now, did he have a sufficient latency period between his exposure and now such that that requirement was satisfied?

A. Yes, sir.

Q. Did you take a cigarette smoking history?

A. Yes, I did.

Q. Is that something that you always do in these evaluations?

A. Yes, sir.

Q. Why is that important to you?

A. That—well cigarettes can cause significant disease in and of themselves and in particular cigarettes and asbestos can greatly increase your risk of cancer of the lung.

Q. So, what did you find on his cigarette smoking history?

A. He smoked one to one-half packs of cigarettes a day for 48 years. He stopped smoking in 1985.

Q. Did you do a physical exam and listen to his chest?

[74] A. Yes, sir.

Q. Was there anything there that you thought was significant?

A. He had rales on the left chest that didn't clear with a cough.

Q. Explain to us what rales sounds like?

A. It sounds—a rales sounds like—when you put a stethoscope up to the chest, it's like pulling Velcro apart. It's like that kind of crunching sound.

Q. Is hearing a rales on one side something you would expect to be consistent with asbestos disease?

A. Yes, sir.

Q. Normally would you hear them on both sides?

A. Not necessarily.

Q. Now, you have an x-ray made.

A. Yes, sir.

Q. What was your finding on the chest x-ray?

A. That he had changes consistent with occupational pneumoconiosis consistent with asbestosis.

Q. Did you do breathing tests?

A. Yes, sir.

Q. What did the breathing tests show?

A. It showed normal spirometry and normal lung volume and a mildly reduced diffusion in '97.

[75] Q. This—you say he a normal spirometry, tell us what that is?

A. Well, that's a test in which one is asked to take in a deep breath and blow into a device that measures how much air you can breathe out and also the speed in which you can get it out. So, you get basically two measurements. We get a measurement to see how much he can get out and it's expressed in terms of liters and then you can also determine how much he can get out in one second and that's a term of whether you have obstructions of air within your lung.

Q. That was normal?

A. That's what was found.

Q. Is spirometry and I asked you this; would you blow out a total amount and that's measured?

A. Yes, sir.

Q. That was normal?

A. Yes.

Q. That is the diffusing capacity or DLCO we talked about, is that different than the spirometry?

A. Yes, sir.

Q. Okay. What did his diffusing capacity show?

A. It showed that it was 71% of what it should be.

[76] Q. That's the single breath one that's used in the impairment tables?

A. Yes, sir.

Q. Is that below or above normal?

A. It's below normal. Eight-one or above would have been normal.

Q. So, he had an impairment of diffusion?

A. Yes, sir.

Q. He had on physical exam, he had rales and you said the chest x-ray showed signs of scarring, right?

A. Yes, sir.

Q. Putting that all together, did you reach an opinion with reasonable medical probability about whether he had any injury or disease from breathing dust?

A. I believed him to have asbestosis and there was a mild degree of impairment.

Q. From your history, is it your opinion that his railroad employment was the cause of his asbestosis?

A. Yes, sir.

Q. Now, I want to have you tell us—let me ask you; he had a significant smoking history, did he not?

A. Yes, sir.

Q. I think—in your opinion, does he have any [77] medical impairment from smoking?

A. No, he doesn't.

Q. So, this is an individual who you believe who smoked but just—the breathing test just don't show impairment from smoking?

A. That's right.

Q. In your opinion, the change in this DLCO is due to what?

A. To the interstitial lung disease which is asbestosis.

Q. Why do you say he smoked all these years yet this gentlemen's impairment is due solely to his fibrotic lung disease? What is the basis of that opinion?

A. The basis of that opinion is that cigarette smoker's disease is invariably an obstructive airways diseases in which they can't get the air out past the mouth or as normally as one otherwise would. When you don't have any obstructive lung disease, which he doesn't have, then you don't essentially cigarette smoker's disease.

Q. So, the fact that this was normal is what you're relying on for the fact that in this particular case, the impairment is not due to cigarette smoking?

[78] A. Yes, sir.

Q. As we go through these cases, Dr. Gaziano, there's some of these gentlemen you're going to say that cigarette smoke played a substantial part in this, is that right?

A. Yes, sir.

Q. It just depends on what these breathing tests show?

A. Right.

Q. If we sort these particular cases out, this is one instance where, for Mr. Vance, you would say the impairment you see despite the smoking history is due to asbestos and not cigarettes?

A. Yes, sir.

Q. As we move through this filthy song where it's combined from both in your opinion?

A. Yes.

Q. Now, from the tests you did, would Mr. Vance fall in the category of people who have disease that has advanced to the point where they have measurable impairment?

A. Yes, sir.

Q. So, in light of that, in light of the fact that you have sufficiently disease with Mr. Vance that [79] he has measurable impairment, in your opinion with reasonable medical probability, do you believe that his asbestos disease will stay about where it is, get better, get worse, what do you think?

A. I think it will get worse.

Q. Why do you say that?

A. Because I think he's got impairment from interstitial disease and that's it more likely that it will progress over time.

Q. Now, at some point if we go back far enough, which we don't have the studies, at some point if we could have caught Mr. Vance at a young enough age, you probably would have had a test where this was normal?

A. Yes.

Q. If you had caught him then and he had chest x-ray scar and a normal diffusion and I'd had asked if he was going to get worse, what would have you said then?

A. As I said, it depends on his age. If he was young enough and since we don't have a track record, I would say I don't know. If he's old enough at retirement age, I'd say it's unlikely that it would be significantly.

Q. Now, Dr. Renn who saw Mr. Vance at the request [80] of the railroad says this diffusion capacity is normal. Have you looked at his record?

A. Yes, sir.

Q. Is that because he uses tables different from Crapo & Morris?

A. I believe that's the principle distance.

Q. If he were to use Crapo & Morris which is the one approved by the AMA Guidelines for permanent impairment that he would have gotten results?

A. Well, I haven't looked at that, so I don't know. I didn't analyze it in that way.

Q. You didn't take his until it ends?

A. No.

Q. Okay. I understand what you're saying. In your opinion, does Mr. Vance have an increased risk of cancer because of his asbestos disease?

A. Yes, sir.

Q. Does that include mesothelioma?

A. Yes, sir.

Q. Does his risk of mesothelioma relate in any way to past history of smoking?

A. No.

Q. Does he have an increased risk of lung cancer?

A. Yes, sir.

[81] Q. Does his increased risk of lung cancer relate to his asbestos exposure in part?

A. Yes, sir.

Q. Does it also relate to his cigarette smoking?

A. Well, less and less he stopped smoking in '85, but there's still a slight increased risk from smoking as well? [sic]

Q. Part of the reason that he's at risk for lung cancer would be his past smoking history?

A. Yes, sir.

Q. And he quit in '85 you said?

A. Yes, sir.

Q. Once you quit smoking, what happens as time passes for your risk for lung cancer from smoking?

A. Well, after about ten years it's about twice a never smokers, which is a great decrease. Normally, it's anywhere from ten to twenty times a nonsmoker.

Q. But it doesn't ever go back to normal?

A. I don't think so.

Q. So, he'll continue to have the risk of lung cancer from smoking and asbestos. Will his risk from either one of them ever completely disappear?

A. No.

Q. Can I have the 10/24/97 electrocardiogram?

[82] MR. RION: If I can have this marked as Plaintiff's Exhibit 5.

(WHEREUPON, the document referred to was marked for identification purposes as Plaintiff's Exhibit No. 5.)

MR. RION: Dr. Gaziano, I want to show you which I have marked as Plaintiff's Exhibit 5 a Scherer Heart Center

cardiology report and we move this as Plaintiff's Exhibit No. 5.

THE COURT: Without objection?

MR. ADKINS: Yes, Your Honor.

THE COURT: It will be received.

(WHEREUPON, the document marked as Plaintiff's Exhibit No. 5 was received in evidence and made a part of the record.)

BY MR. RION:

Q. Do you have a copy of that?

A. Yes, sir.

Q. Plaintiff's Exhibit 5 is a stress test Echocardiography, did I pronounce that right?

A. Yes, sir.

Q. All right. Look through that just a minute, Dr. Gaziano, and tell us does the stress test comment on whether Mr. Vance has any significant impairment from [83] heart disease?

A. It shows that he does not.

Q. If you'd turn to the last page and I'm going to put this on a—by the way, are you familiar with Scherer Heart Center in Bluefield?

A. No, sir.

Q. Does this appear to be a record from a treating physician who is in no way connected to the lawyers in this case?

MR. ADKINS: Your Honor, I object to that. I don't think the doctor would know that.

THE COURT: Yeah.

BY MR. RION:

Q. Well, let me ask you this way. Does this appear to be a record of a treating physician?

A. Yes, sir.

Q. If we look at the last paragraph; it says his echocardiogram was normal. I do not find any evidence of coronary disease and I think his dyspnea—what does that mean?

A. Shortness of breath.

Q. —is related to pulmonary disease and, therefore, pulmonary function studies were done and does show restriction related to exposure to asbestosis in [84] the past. Now, do you agree with the assessment that his dyspnea or shortness of breath is likely related to pulmonary disease?

A. Yes, sir.

Q. Do you agree with the assessment that he has asbestosis?

A. Yes, sir.

Q. Now, they say that the PFT show restriction, do you agree with that?

A. No.

Q. But you do agree with the assessment that there's asbestosis and that his shortness of breath is due to lung rather heart disease?

A. Yes, sir.

Q. But as far as them saying, "restriction", you think they made a mistake?

A. Yes, sir.

Q. Do you believe that because of his lung cancer and the mesothelioma risk that Mr. Vance should be monitored medically?

A. Yes, sir.

Q. Why is that?

A. Well, I think he should be monitored because of his lung condition and be observed for possible [85] development of tumor cancer.

Q. Is there any real way to treat the asbestosis itself and cure it?

A. No.

Q. But you think he should go to the doctor just to make sure whether he develops a tumor?

A. Yeah, I think if he gets a respiratory problem, I think doctors could do to relieve it if it should become a problem.

Q. How often should he be checked and monitored for the development?

A. I'd recommend an x-ray at least once a year and breathing tests every two to three years and then maybe after a while if there's no progression then you can kind of do it as he lives.

Q. Depending on what happens?

A. Yeah.

Q. In your opinion, though, with the DLCO being where it is, do you believe all the time there's likely to be some progression?

A. Yes, sir.

Q. What's the costs of just the medical monitoring for the cancer and progressionally described here?

[86] A. Well, the x-rays probably about a hundred and the examination depends. The follow-ups anywhere from fifteen to a hundred and how much is done on the follow-up exam. The breathing tests are around three hundred dollars for all of the tests.

Q. In your opinion knowing what we know about Mr. Vance's total health picture, is his pulmonary disease or lung disease which you said is caused by asbestos likely to be life-shortening?

A. Yes, sir.

Q. So, if we had a group of potentially twin Mr. Vances, 50 in one room and 50 in the other, but half of them didn't have this asbestos lung disease, which half would live longer?

A. The half that doesn't have asbestos lung cancer.

Q. Now, is that something, Dr. Gaziano, that you will say about anybody—any individual or every individual you diagnose with asbestos, you always say that their disease is sufficient to be life-shortening?

A. Well, I think so, yes. I think if you, you know—you're asking me to put myself in a position of an insurance company and, so, they look at risks and, so, from that point of view, yes, there is increased [87] risk of cancer which is significant. I can very often tell whether they're going to develop disabling pulmonary cancer with a great deal of assurance, but not a 100% even in that instance. So, there is a certain unknown but definite risk of progressive and fatal pulmonary disease.

Q. In his case with the progression you say that's going to occur and the risk of progressive asbestosis and the risk of cancer and you add all that up and what in your opinion in a reasonable medical probability are you saying that the consequences of his asbestos exposure are likely to be life-threatening in some regard or another?

A. I didn't say that.

Q. Okay. That's what I was asking.

A. It's likely an increased risk to develop cancer.

Q. That's what I was trying to clarify.

A. Likely, I think if we got 50%, I don't think life-threatening. If we got the 50% life-threatening versus nonlife-threatening.

Q. So, he's got a substantially increased risk, but you can't for sure?

A. Can't say how much.

[88] Q. Let's—I want to have you come down and show us what you go through to read these x-rays?

A. You want me to read Mr. Vance's?

Q. That's what I figured, yes.

A. Well, I think I always like to put up a normal chest x-ray.

Q. Sure, do that and show us what we're looking at.

A. Abnormal chest x-ray and then the claimant's x-ray.

Q. Be careful when you're doing this, Doctor. Just can of [sic] stretch back so you keep out of everybody's way and then talk.

A. These are standard films from the International Laborer Organization who produce and sell these films to use as a reference on dust diseases of the lung, and they say that this is a 0-0 or normal chest x-ray and basically what we see is the heart in the middle. We see the disphragm which separates the chest contents from the abdominal contents, which are down here. This dark area on both sides are the lungs. There are some strange soft lines and these are close in to the midline and these are the blod vessels, and the pulmonary arteries tend to stay close to the midline, [89] and these are vacuous. So, this defined as a normal x-ray.

Q. All this stuff in here is blood vessels are normal?

A. Yeah, blood vessels and airways.

Q. When you say you can get out here and—

A. In this portion, you notice that you don't see very much because the concentration of them are so small that they're not seen readily on a chest x-ray.

Q. Let me ask you; you say the International Laborer Organization makes these films?

A. Yes, sir.

Q. Are these films that are designed specifically for reading and interpreting dust disease?

A. Yes, sir.

Q. Are these the films you use in taking the test for the B-reader exam that you took?

A. You have to take these along and then you compare these—these are various stages. It's actually about 40 films with various stages of pneumoconiosis compared with a test film or in this case with an individual's film.

Now, this is a case in which the standard film shows a early Class I. Now, this is a pleural plague, [90] this thing right here. This thing that sort of looks like a champagne bottle.

Q. Now, this film has been certified by the ILO as being a normal film?

A. Yes, sir.

Q. This one is certified as showing disease?

A. Yes, sir.

Q. All right. Kind of hard for me to tell the difference.

A. Now, this is Mr. Vance's film. Mr. Vance has some changes in the lower zones and on both films this is a little bit overexposed, but you can see the spots—

Q. Doctor, you may need to, I'm not sure, you may need to back out of sort of folks way.

A. All right. These are two films, and I see in the lower zones, we expect asbestos to be some linear lines that respond to an asbestos condition and, similarly, this is another one of his films, and actually it's out of this area that's more important.

Q. All right. Let's back up a minute. The thing I find confusing. All of this business in here you said is blood vessels?

A. Yes, sir.

[91] Q. And that's normal here, here and here?

A. Yes, sir.

Q. Where is it you look for markings that are not normal blood vessel markings to determine if scarring is present?

A. If you see some changes in—these areas are usually—for black lung and silicosis, it's usually the upper portion of the lung, and asbestos is usually the lower zone. So, he had some definite—you will see some streaks out here, but then there is under these some fine markings.

Q. All right. So, if we look out at here on the normal film, all of this in here is normal and then when you move out here on the edge, there's really not much?

A. You don't see anything on a normal film out here on the edge, and that's where it's sort of the contrast of these films are most important.

Q. On the other hand, if I point—let me hold the pointer. If I point, this right here is a rib, right there or is it right in there?

A. No, that's the—rib.

Q. Okay.

A. Because actually what you can do, Jack. This is a rib coming around and this is a rib coming and this [92] is a rib coming from the back and right here in this window is lungs showing through and through and through that window a lung through and through and that is where you sort of look if you don't want the ribs to get in your way.

Q. So, all these markings out in here, in your opinion, are what?

A. Are asbestos disease markings.

Q. As compared to—could you put your hand over what we're not supposed to look at?

A. Well, (inaudible).

Q. Cover up on that and let's take—

A. Over this.

Q. Let's take the normal one.

A. I'm going to have you focus in that—

Q. You want me to do the same thing over here?

A. Yes, that's much better.

Q. We're looking—

A. We're looking around this edge here.

Q. And here?

A. And right here (indicating).

Q. That's normal?

A. Yes, sir.

Q. That's Mr. Vance in the middle?

[93] A. Yes, sir.

Q. Now, I think we got some folks still kind of looking. Can everybody see what we're doing?

THE COURT: If any of you would like to get closer, please just step up.

MR. RION: I was just asking if we were in anyone's way.

COURT REPORTER: Am I in your way?

THE COURT: We'll recess now for lunch and resume at 1:05, five minutes after one.

(WHEREUPON, a recess was taken for lunch after which the following proceedings were had.)

MR. RION: Do you want me to proceed, Judge?

THE COURT: Please.

BY MR. RION:

Q. Dr. Gaziano, when we ended for break, we were looking at chest x-rays on Mr. Vance and I think—have you shown us both chest x-ray? There were two that you stuck up.

A. Well, they were actually the same time.

Q. They were done at the same time?

A. Yeah.

Q. Let me just ask you, when you showed us how to [94] look out into the side areas of the lung for x-ray signs of scarring and showed us that.

A. Yes, sir.

Q. Could you come down and now show us based on this drawing from a medical text what portion of the scar tissue shown in this particular drawing would correspond to the areas of fibrosis you noted on the x-ray. You understand that this is just an illustration from a medical text and is not any particular individual's lungs in this sketch.

A. One of the reasons you can see it so much better in the periphery that you're going through the lung tissue. The basic area that we were focusing on would be this area down in here, and basically what this is trying to depict is up here, this area up here is the area that's normal and asbestos tends to be a disease of the lower part of the lung, and scarring is this white material which is a scarring reaction to asbestos and it comes together to form larger and larger bands of tissue. So, there is scarring in the lung portion and that's his sister, form 2, and this is actually called honeycombing. It's a sign of advanced asbestos disease, but these large thickened bands

are the diseases of asbestos and the pleura changes are of plaques and this [95] is actually if the lungs were removed and you were just looking at the chest along the ribs you're seeing the white raised area that's really scar tissue and that's called plaques, so then you can see that same thickening depicted here in a schematic drawing. This is not a photograph.

Q. So, the little lines that you showed us out here in the periphery of the lung would be representative of the scarring process that you've shown us, this in white here?

A. Yes.

Q. Okay. Thank you. Let's talk now about Mr. Butler?

A. Who?

Q. Mr. Carl Butler. When did you see Mr. Butler?

A. I saw him on 10/30/97.

Q. Did you interview him about his potential exposure to dust?

A. Yes, sir.

Q. What do your records reflect that he told you?

A. That he worked as a plumber and a pipefitter for 33 years and retired in 1995. He worked in chemical plants, schools, firehouses, paper mills, which he was exposed to asbestos insulation working alongside [96] insulators and, also, tearing off insulation from pipes himself. He was also exposed to fly ash in coal in some of the powerhouses.

Q. So, he was exposed to both asbestos and coal?

A. Yes, sir, fly ash.

Q. Now, Mr. Butler is going to testify, I want you to assume in this case, that in addition to working in powerhouses, chemical plants and a large variety of other employment that he did work for the railroad for a period of time in that that included approximately three months of time during which he was exposed to asbestos on most days from dust created from repairing steam engines. I just want you to assume that as we go through this. On the other hand he had several decades of exposure to asbestos in other trades. So,

he's a little different than these other men who were career railroaders. He's worked all over the place.

A. All right.

Q. Worked only a relatively—compared to the rest of his employment a relatively short period of time at the railroad. Did he have from what you saw and I made some notes here about the clinical tests that we're going to through with each man. I didn't write anything about history or latency here, but did he have a [97] sufficient latent period between his exposure and now so that he satisfies that requirement?

A. Yes, sir.

Q. Now, did you take a smoking history?

A. Yes, sir.

Q. What does your smoking history reflect?

A. That he smoked eight to ten years of cigarettes about a pack a day, stopped smoking 40 years ago.

Q. That would have been in the 1960s?

A. '60s.

Q. The only thing that I'm going to do as we go through this—I think your smoking history and Dr. Renn's, who examined on behalf of the railroad, smoking history shows that he quit in 1965 or thereabout, but there's a hospital record we've got that says he smoked until 1986 and as we go through this, I'm going to ask you to assume one way and then the other, because is there any way that you can look at records and tell which one is right if one record says he quit in '65 and one says he quit in '86?

A. No.

Q. All right. So, what I'm going to do as we go through this is we take questions, I'm going to ask you [98] to assume that he quit in '65 and then I'll ask you to assume that he in '86, and we'll see if your answer differs and then when Mr. Butler takes the stand we'll have him talk about what his presmoking was, and the ladies and gentlemen of the jury will be the judge of the facts on that. Fair enough? So, I'm not going to put you in a position of deciding what his smoking

history was or was not, because there is a discrepancy in the records.

I assume you had an x-ray taken and that you reviewed it?

A. Yes, sir.

Q. What did the x-ray show by your interruption?

A. That it showed irregular and rounded capacities or spots throughout five out of six lung zones.

Q. Pardon me, Dr. Gaziano, I want you to put the correct poster that we're talking about Mr. Butler?

A. He also had pleural plaques.

Q. Were those findings abnormal?

A. Yes, sir.

Q. Were they consistent with what you would expect with dust disease?

A. Yes, sir.

[99] Q. On the x-ray, we'll put abnormal.

A. Yes.

Q. Scarring?

A. Yes, sir.

Q. Did you examine him personally and listen to his chest and look at him?

A. Yes, sir.

Q. Did you find anything significant in the exam?

A. Yes, he had rales in both lungs.

Q. That's the noise in the chest you spoke about earlier?

A. Yes.

Q. Anything else?

A. No, sir.

Q. The spirometry you talked about where you take a full breath and blow the air out and measure how much, was there any abnormality there?

A. Yes, sir.

Q. What was that?

A. There was a mild obstruction in the throat.

Q. So, it was abnormal and it was an obstruction?

A. Yes, sir.

Q. Now, is that something that you would normally see with asbestos disease?

[100] A. No.

Q Would you see it with any kind of dust disease?

A. You could see it with black lung and silicosis. They tend to have more obstruction.

Q. The DLCO for diffusing capacity, was it normal or abnormal?

A. It was normal.

Q. It was normal. Now, did you reach an opinion with reasonable medical probability about whether Mr. Butler had any dust disease?

A. I did.

Q. What's your opinion?

A. That he had a mixed dust disease, which included asbestos lung disease.

Q. So, mixed dust—you say asbestos was one of the dusts?

A. Yes, sir.

Q. What's the other dust?

A. I believe it was probably coal, coal dust.

Q. Now, here's where we'll get back to that smoking history. If we assume his smoking history as stated in your records is correct, that he quit in 1965, what would your opinion be about the cause of this [101] obstructive defect?

A. It would be related to his occupational disease.

Q. Because he's got an element of coal in there, also?

A. Yes, sir.

Q. If we go back and say that we assume that that hospital record was right and that he smoked right on through until 1986, then what would you say your opinion about the cause?

A. I wouldn't know which one it would be, whether it was dust or whether or smoking. It could have been either one.

Q. Why is that?

A. Because it produces the same kind of impairment.

Q. If he quit smoking that far back, you'd be willing to attribute the obstruction to his dust disease?

A. Yes, sir.

Q. If he was smoking through '86, you wouldn't do it?

A. No.

Q. Assuming that he smoked through '86, would you [102] be comfortable attributing some degree of his obstruction to smoking?

A. Well, I think he's got a pneumoconiosis, definite pneumoconiosis, and it's mere presence represent some abnormality and I would say, yes.

Q. That if he smoked through 1986 that his smoking probably contributes to—

A. I would think so.

Q. That's just a debate we'll resolve elsewhere because I can't ask you to resolve that. Would you in your opinion, assuming again that the smoking history is 1965 quitting, that he quit in 1965, do you have an opinion about whether his pneumoconiosis is likely to progress or worsen?

A. I think his lung disease is likely to progress, but I don't think it's very bad right now. It's very mild right now.

Q. If we assume for a minute, and I'm not saying it is, but assume for a minute that the 1986 date is the correct for him quitting smoking, which I understand changes the clinical picture for you because then you're unable to say, this is caused by his pneumoconiosis. If that's the true facts, what do you think about the likely of him progressing?

[103] A. As I said earlier, whatever the cause, once you get a certain amount of impairment, it tends to progress. The more impairment you have, the more sure it is progressing, and I don't think moderate severe impairment unfortunately there's a point where you stopped smoking or whatever and it continues to get worse almost invariably. So, it is a factor of severity, too.

Q. Can you come down and show us the x-ray of Mr. Butler and go through the same exercise we did before?

A. Yes, sir.

Q. Doctor, if you could just back off and put yourself where everybody can see past you?

A. All right. I believe there's definitely changes here, but lets equivalent the changes here of an asbestos nature, of an asbestos type. Now, I don't think you can appreciate it—

Q. Back off.

A. Give me a minute. I have to look at it closely to see these. These are little nodules right in this area. Do you see that in this corner there are little rounded nodules that are more typical of coal and sand rather than asbestos.

Q. Get that for us again.

[104] A. Okay. Well, you have to get close and you have an area about the size of a half-dollar, there are within that nodules—do you see that? There's three one right after the other, that one, that one, and that one. There are all nodules around here. That's why I included—this side had—

Q. Coal?

A. Coal. Now, the other thing about this man's film and I want to show the jury some pleural changes.

Q. Well, do one quick thing before this film, Doctor. Let's do the same thing we did before about the part—there's a part that asbestos is in, what part of the lung?

A. The lower part of the lung.

Q. Well, let's block off—you block off what we're not supposed to look at.

A. Yes, I think so. I would look down in this lower zone—

Q. Compare normal, which I'm on the normal, right?

A. Right.

Q. You blocked off the abnormal?

A. Right. Here's some of them as well as you're looking at, at this area right here.

[105] Q. You already said there was another film that shows that on it?

A. I'm going to show the standard film. This standard film shows the pleural plaques and that's another manifestation of asbestos. Now, this is the pleural plaques and if you could look at this line right here is the inner edge of the ribs. There's not supposed to be a line beyond the inner edge of the ribs and right here is a plaques that the standard film tells you that this is not the patient and here's one that's designed just to show you the plaques and what it looks like on x-ray. This thing right is one of those white plaques that goes around the side of the chest. Now, here is a plaques. It's about a quarter of an inch. Each one of these represents a plaques and you see this is again the inner margin of the ribs and if you look in the inner margin of the ribs you shouldn't see any lines. There is a line right there, so that's a plaques. Here's another plaques and this one has little flecks of calcium in it. Do you see that sliver. That's calcium deposits in the plaques. Now, calcium—if you see calcium there is plaque, even if you don't see elevation—this line right here, this black line about an inch long is a plaques and here's another [106] little sliver of it and that's on the diaphragm. Now here's another plaques that comes up about a half an inch. Now, if you saw this gentleman—this is our patient and we begin to follow and don't see anything, and here we begin to see a line and then we see a line here. Well, this line right here is a good three quarters to an inch.

Q. Tell us how that compares with the normal?

A. Yeah, here's the normal film. Now, here's the normal inner table that there is not any line. It is completely and here's the patient, a line, here is this line. Here is this line here that was a plaques and so forth. There's also plaques over here. It's not quite as clear as this one. This one is very clear, but here's a line coming up right here and it sort of fades out. Some of these fade out. Just like this one. This one comes out and fades out in the standard film and it's the same

way this one fades out and this one sort of fades, but this one is fairly demarcated. Is that it for this?

Q. Yes. I want to ask you about a couple terms, Doctor, that appear in the medical records regarding Mr. Butler. When we see the term, COPD, what does that usually mean?

[107] A. Chronic obstructive pulmonary disease. It's an obstruction to flow.

Q. That's where you said the spirometry showed obstruction, the same deal?

A. Yeah.

Q. In most people, the most cause of that is what?

A. Cigarette smoking.

Q. That's why you were saying that if he really smoked up until 1986, if he's got COPD, smoking is probably a big factor?

A. I would think it's important, yes.

Q. Now, if you see the term on x-rays, interstitial fibrosis, what does that mean?

A. Well, that means there are changes in the lungs that are linear and there are many causes, one of which is asbestos. So, in order to determine what interstitial markings means, you really—you've got somewhere other than just the x-ray.

Q. Need a history?

A. Need a history. You have to try and figure out what it is, and so when you have interstitial markings of this type and a history of this type, then you must presume that it's due to asbestosis because [108] that's what the ATS book on occupational diseases require.

Q. Is asbestosis a form of interstitial fibrosis?

A. Yes, sir.

Q. Is it the same or different than chronic obstructive pulmonary disease?

A. It's very different.

Q. You said that the American Thoracic Society has stated that if you have interstitial fibrosis and asbestos exposure you have asbestosis?

A. Well, it's sort of like that. If you don't have any good other explanation and you have a good occupational history then that's what's required.

Q. I'd like to ask you about the statement when you were talking here on the diagnosis of nonmalignant diseases due to asbestos?

A. Yes, sir.

Q. Could you put this on the—

THE COURT: What do we have there for the record?

MR. RION: It's the American Thoracic Society 1996, the diagnosis of nonmalignant diseases related to asbestos, official statement of the American Thoracic Society.

[109] THE COURT: Which page?

MR. RION: The last page of the text not counting the bibliography.

BY MR. RION:

Q. Given a clear history of exposure to asbestos, a diffused interstitial fibrosis can be presumed to be due to asbestos if other forms of interstitial fibrosis are relatively uncommon. The prevalence of lesser degrees of interstitial fibrosis is not well known and considerable caution must be exercised in attempting to attribute all such phenomena to asbestos exposure either nominal or (inaudible) and is that what you were talking about, that asbestos is a form of interstitial fibrosis, but you need a history to make the diagnosis?

A. Yes, sir.

Q. Now, the reason I'm asking about all this is it relates to Mr. Butler's medical records.

MR. RION: This is the Department of Imaging Reports from Princeton Community Hospital dated 4/13/93, and I move its admission.

MR. ADKINS: No objection.

THE COURT: It will be received.

(WHEREUPON, the document referred to was marked for identification purposes as [110] Plaintiff's Exhibit No. 6 and received into evidence.)

BY MR. RION:

Q. Do you have a copy of this, Doctor?

A. Yes.

Q. 4/13/93 comparison to 9/9/90. No significant interval change has occurred in the appearance of the chest which demonstrates *changes of COPD*. Let's stop for a minute. COPD is an obstructive lung disease you talked about earlier?

A. Yes, sir.

Q. All right. Comma, mild basilar fibrotic changes in left ventricular prominent. Now, basilar means what, Doctor?

A. In the lower zones.

Q. And fibrotic means what?

A. Scarring.

Q. Is basilar fibrotic changes scarring changes in the lower part of the lung what you'd expect to see?

A. That's what I just showed you.

Q. Let's move down to the bottom. Impression: Four full chest without acute pulmonary disease? What does acute mean?

A. It means sudden or short term.

[111] Q. *Chronic Obstructive Pulmonary Disease* and that's similar to what you said you diagnosed by spirometry, is that right?

A. Yes.

Q. Basilar interstitial fibrosis, is that what you've shown us here on the chest x-ray, basilar interstitial fibrosis?

A. Yes, sir.

Q. Thank you. That's what the American Thoracic Society says that if you've got that pattern on chest x-rays and if you've got a history of exposure it would be presumed to be due to asbestos because according to them other forms of fibrosis are "comparatively" rare?

A. Yes, sir.

Q. Does Mr. Butler, in your opinion, have an increased risk of cancer?

A. Yes.

Q. Does that include a risk of mesothelioma?

A. Yes.

Q. And lung cancer?

A. Yes, sir.

Q. Would it be the same with all of these gentlemen that the mesothelioma risk is due solely to asbestos, but the lung cancer risk if they smoke is due [112] to some combination of smoking and asbestos?

A. Yes.

Q. Now, if he quit smoking in '65, what would you say about his risk of lung cancer from smoking?

A. It would be very, very low, very tiny.

Q. If he quit in 1986, what would you say about it?

A. Well, it's still relatively small.

Q. Should Mr. Butler, as we said before, have medical monitoring to monitor the possibility of progression of his lung disease or for his cancer risk?

A. Yes, sir.

Q. Let's taik next about Mr. John Shirley. When did you see him?

A. I saw him on November 15, 1997.

Q. What did you learn about his exposure to dust?

A. He worked for the railroad as a laborer from 1947 to '51, he moved freight at the freight house, which is under the transfer shed in which he was exposed to bags of asbestos dust and asbestos rolls. He was a clerk from '51 to '76 in a

yard office and at time went out in the yard around steam engines and in checking cars. He was also exposed to sand when the engines were braking within the yard.

[113] Q. Are you familiar with that type of exposure where you have silica exposure from the braking process?

A. Yes, sir.

Q. Did he satisfy the latency that there had been sufficient time passed?

A. Yes, sir.

Q. Did you take a smoking history or see whether he had smoked?

A. Yes, I did. He had never smoked.

Q. So, smoking is not an issue in this particular case?

A. No, sir, it is not.

Q. Did the physical exam show anything of consequence?

A. He had rales in both lungs.

Q. On some of these gentlemen, Dr. Gaziano, and I'm not sure exactly which ones, we're going to have records showing that you heard rales and Dr. Renn is going to report he didn't. What do you make of that?

A. I believe I'd stick with my findings. That's what I make of it. I heard rales, because I don't write it down unless I hear it.

Q. I don't guess you can really comment on whether he heard it or not?

[114] A. No.

Q. What did the x-ray show?

A. He had rounded and irregular in both lungs.

Q. Is that abnormal?

A. Abnormal for fusion.

Q. Abnormal?

A. Yes, sir.

Q. Is this the kind of abnormal you'd expect with what type of dust?

A. Asbestos and sand or coal.

Q. All right. The spirometry test; what did it show?

A. It was normal and lung lines were normal. The diffusion was moderately reduced.

Q. What was the percentage?

A. Sixty-five.

Q. Anything below eighty is considered abnormal?

A. Yes, sir.

Q. So, he's—you would write that impairment as what category?

A. Moderate.

Q. Did you make a diagnosis?

A. Yes, I did, with Dr. —

Q. I picked a bad example.

[115] A. But I also—

Q. Some of these there is a variation?

A. Oh, yes.

Q. Did you reach an opinion with reasonable medical probability about whether Mr. Shirley had any disease caused by dust?

A. I believe he definitely does.

Q. What's that diagnosis?

A. That he has mixed dust again with a moderate amount.

Q. Mixed dust, asbestos and sand?

A. Yes, sir.

Q. Or silica is probably the more—

A. Silica, sand; the same thing.

Q. In your opinion with reasonable medical probability, is his railroad employment the cause of that?

A. Yes, sir.

Q. And you know, I need to back up. I'm going to apologize because I just forgot to ask you and this is an important question. Let's shift gears just a minute before—go back to Mr. Butler who only had three months of exposure on the railroad.

A. Okay.

[116] Q. Remember he's got several decades in other employment. Let me ask you an obvious question. Would hs decades of employment outside the railroad have contributed to his asbestos disease?

A. Yes, Sir.

Q. If he worked for and I want you to assume that this is what he's going to say; that he worked for three months—he worked for the railroad longer than three months, but there is a three-month period of time during which most days he worked around asbestos dust created by disturbing insulation on steam engines. In your opinion would that be not the only cause, but would it be a contributing factor to his dust disease?

A. Yes, Sir.

Q. But obviously, the other exposures in other industries would have been a bigger contributor?

A. Absolutely.

Q. I didn't mean to interrupt our flow by shifting back and forth, but I just flat forgot to ask it.

In your opinion, is Mr. Shirley—is his lung disease, specifically his dust disease, likely to progress?

A. Yes, sir.

[117] Q. Why is that?

A. He's already has quite a significant impairment from it.

Q. By impairment, you're referring to this DLCO test?

A. Yes, sir.

Q. Can you tell us whether his pulmonary impairment caused by his dust exposure with reasonable medical probability is going to be life-shortening, can you tell us that?

A. I believe it will, yes, sir.

Q. Is there anyway you can tell how much?

A. No.

Q. Can anybody do that in your opinion?

A. No, sir.

Q. Can you come down and show us the chest x-ray?

A. Yes, sir.

Q. Let me ask you while you're getting these chest x-rays together, can being in congestive heart failure cause changes that look like scarring on chest x-rays?

A. No. What it can do if you're in congestive failure it shows some changes that might be construed—the thing about heart failure is that there is so many [118] other changes that it's generally not difficult to say that it could be the heart failure, number one. Number two, if you're in heart failure and you have changes that might be considered to be the asbestos, if you give Lasix, both the asbestos and the heart failure goes away, but it would it be facetious that the heart failure is not something that will stay. It's something that will be eliminated quickly. It can be something that goes on for years and years because then a person will be dying of it and will probably not live that long.

Q. Is it easy to tell when you examine a patient whether he's in congestive heart failure?

A. Yes, sir, I think the x-rays probably would speak the truth, but there are other signs that suggest that he's heart failure.

Q. Was Mr. Shirley in heart failure when you examined him?

A. No, sir, he was not in heart failure, and I'm not sure, but I believe his heart failed because he needed a heart valve, and after he got him a heart valve which you can actually see from the side view—this little ring thing here. He had a heart valve put in in '95.

[119] Q. Well, he knew he—

A. These are the surgical clips from having had the operation.

Q. But he was not in heart failure when you examined him?

A. No, sir. This is part of the side view and this is the—

Q. Now, I notice that this x-ray looks a little darker than your other x-rays and a little darker than these standards or am I mistaken about it?

A. I think you're right. I think it's probably slightly overexposed film, and actually, if anything, that minimizes any—

Q. That's what I was going to ask you. If the film is a little darker because of the technique, does it become harder or easier to see the type scarring we're looking for here?

A. It becomes harder.

Q. Okay.

A. But I think that right in this area you can see and let's get our sheets of paper, our perennial piece of paper and see these changes in the lung, and actually he has not just—it's interesting, most of these cases the disease is clearer on the right side [120] than the left and I think that's largely because the heart is in the way, but in the upper zone, there's also changes to—

Q. Show us where you're talking about now.

A. Well, in between these ribs and you can even see through you see these little rounded opacities rounded.

Q. Is that from the asbestos forming?

A. No, that's from the coal or sand. Here you can see the effects of the surgery, the large sutures and that's the little marker for the coronary arteries. Right here is the little rounded densities where you expect to see coal dust. Coal dust is upper—right here in this area. Coal dust is upper zone and asbestos is in the lower zones.

Q. In your opinion, Dr. Gaziano, does he also have an increased risk of cancer?

A. Yes, sir.

Q. And mesothelioma?

A. Yes, sir.

Q. I believe because we're dealing with a nonsmoker, smoking wouldn't be a factor in any event?

A. No, sir.

Q. Now, let's talk about Mr. Johnson. When did [121] you see him?

A. I saw him on 11/15/97.

Q. What did you learn about his exposure to dust?

A. That he works for railroad on the right-of-way and that he operated a ballast regulator where he stops and tapped ballasts. He operated a rock cleaner with exposure to rock dust over the years. He also operated a crane and clamshell with exposure to asbestos from friction bands, clutches and brakes which were on the crane and clamshell.

Q. So, he would have primarily been exposed to what type or types of dust?

A. From '52 to '57, so he would have been exposed largely to sand or silica and to a lesser extent to asbestos.

Q. Did he have a sufficient latent period?

A. Yes, sir.

Q. How about his smoking history?

A. He smoked a pack of cigarettes a day for 30 years having stopped in 1989.

Q. Is that a significant smoking history in your opinion?

A. Yes, sir.

Q. Was there anything that was significant in the [122] physical exam?

A. No, sir.

Q. I'll just put zero for no significant findings. How about the x-ray, what did it show?

A. It showed a very minimal change of 1/0. It also showed a pleural plaques.

Q. Were the changes enough to be considered abnormal?

A. Yes, sir, 1/0.

Q. When you say 1/0, tell us what you mean?

A. Well, that's the earliest. There are three stages of occupational lung disease; Stage I, Stage II and Stage III. That's been the classical definition and the Labor Organization International wanted to sort of divide those three

stages into three other stages and so what they did, they established the Category I as a 1/1.

Q. That's this film over here that you've been showing us?

A. Yes, sir, and it's a 1/1 and then another one is a 2/2 and another one is a 3/3, so that if there are boundary films, that is between a 1 and 2, you see which one it's closer to and you designate it that way.

Q. So when you looked at his film you compared it to a 1 clearly abnormal?

[123] A. And a 0—

Q. And a 0 clearly normal?

A. A zero normal and so it looked a little bit closer to the abnormal than the normal.

Q. It was closer to the 1 than to the 0, but you considered it a 0?

A. Yes, sir.

Q. Is a 1/0 considered abnormal?

A. Yes, sir.

Q. On the other hand if we switch it around. Let's say you thought about a 1, but decided it really belonged in 0?

A. Then it would be a 0/1 probably.

Q. Okay. So, just to go through that process; if it's 0/0, it's clearly normal?

A. Right.

Q. If it's 0/1, you thought about calling it abnormal but you decided it was normal?

A. Right.

Q. Then, you switch over and do a 1/0, you thought about calling it normal but decided it's abnormal?

A. Yes.

Q. When you get to 1/1, it's clearly abnormal?

[124] A. Abnormal.

Q. I believe the last two we went through were 1/1's before we got here?

A. Yes.

Q. How about the spirometry?
A. He had a mild obstruction.
Q. Spirometry shows obstruction.
A. And a reduced diffusion, moderate diffusion.
Q. Do you know what the percentage was?
A. Sixty-four.
Q. In your opinion, what's the cause of his obstruction?
A. Coal dust and cigarette smoking both—I mean, sand dust and cigarette smoking.
Q. Can you say which you think is more important?
A. No.
Q. What's the cause of his diffusion capacity abnormality?
A. I think that's largely from his occupational lung disease.
Q. Did you diagnose with a reasonable probability occupational lung disease?
A. Yes, sir, I did.
Q. What's the diagnosis?
[125] A. Silicosis and asbestosis, mixed dust.
Q. In your opinion, is Mr. Johnson likely to progress or is his pneumoconiosis likely to progress?
A. Yes, sir.
Q. Is that again because he's in that category of patients who's developed, not just x-ray changes, but measurable impairment?
A. Yes, sir.
Q. Does he have a risk of cancer because of the asbestos component of his pneumoconiosis?
A. Yes, sir.
Q. Would any of these gentlemen, to your knowledge, have a risk of cancer because of the silica portion of their pneumoconiosis?
A. You're bringing onto an entirely new area and the answer is, yes, silica has now been established by authoritative sources as being a carcinogens or cancer-causing substance. It's very, very mild when you compare it with asbestos as a cancer-causing agent.

Q. That was my next question.
A. It's much less—it's taken long hard work to find the association, but now IARAC, which is the voice of things that cause cancer, but they had to prove that it does cause cancer.
[126] Q. Can you come down and show us the x-ray on Mr. Johnson?
A. Yes, sir. If you look at this area again and this area here and this area here, I think that it's certainly abnormal. It's not to the extent that you see here, but there is something definitely there. So, that's why he's been made a designation of a 1/0.
Q. Doctor, do you want to again put up these pieces of paper to focus us in on where we can get away from the blood vessels and into the actual scarring?
A. I think this particular area has some small like changes. Now, if we look at the right—I'll try to get a better film for you. If these were taken on the same day, they both would show similar changes, but they are borderline films.
Q. Get your file, if you would, on Mr. Ayers. Are you ready?
A. Yes, sir.
Q. When did you see him?
A. 11/15/97.
Q. Tell us about what you learned about his dust exposure history.
A. That he worked on the railroad from '48 to '62 as a yard brakeman; '50 to '62, he was exposed to [127] switching cars and going into mines; ran the steam engine and shuttled coal into the boilers. He was exposed to asbestos riding the steam locomotives. Forty-seven to '50, he worked in the repair shop with exposure to asbestos in the regular repair and refurbishing of steam locomotives; '62 to '64, he was a Ford dealer and a shop foreman and he was also exposed to asbestos in automotive repair and changing brakes. From '63

to '85, he worked in a body and paint shop with exposure to grinding bits, sand and paint dust and he was disabled from a heart attack and had to quit work.

Q. Was there any findings of significance on the physical exam?

A. He had a scar on left chest, small four-inch, and nothing else.

Q. So, as far as dust disease?

A. There are no rales.

Q. Nothing of significance on exam?

A. No.

Q. How about the x-ray, what did it show?

A. It showed a mild irregular obstruction of a 1/0.

Q. That was consistent with what type dust disease?

[128] A. Asbestosis.

Q. The spirometry, what did it show?

A. He had a moderate obstructive impairment, mild hyperinflation and a mild diffusion impairment.

Q. What was the percentage on that?

A. Seventy-nine.

Q. Anything below 81 is abnormal and he was 79?

A. Yes, sir.

Q. Did you reach an opinion with reasonable medical probability about whether he had dust disease?

A. I believe he did, yes, sir.

Q. The diagnosis was asbestosis?

A. Yes, sir.

Q. In your opinion, what is the cause of the obstruction that you measured on spirometry?

A. Cigarette smoking.

Q. Asbestos doesn't have anything to do with that?

A. I don't believe so, no. He smoked rather heavily.

Q. The diffusion impairment of 79%, what do you believe causes that?

A. Asbestos, but it could also be somewhat affected by his obstructive lung disease. It's quite [129] significant.

Q. Can you say with a reasonable medical probability that his asbestos disease contributes to that?

A. Yes, sir.

Q. But you think the smoking also could?

A. It could contribute, yes.

Q. Do you believe that he's likely to progress?

A. Absolutely.

Q. Does he also have a risk of cancer and mesothelioma?

A. Yes, sir.

Q. We talked a little bit about the need for medical monitoring for cancer. The same would really be true of all these gentlemen, would it not, as far as their need to have x-rays every year?

A. Yes, sir.

Q. Okay. I didn't want to have to go through that with each person. Do you want to come down and show us the x-ray?

A. Well, I believe these films show in contrast. I think in this area again, you see a line there. You see a line there. It's obvious that you don't—where it's gray, you see a similar finding here. So, you want [130] to have a—let's put a little white line and drew it through the line and it's minimal. It's certainly less than that.

Q. But you think it's closer to the 1 than the 0?

A. Yes, sir.

Q. If the members of the jury want to read the x-ray with us, the comparison really would be this closer to this or this?

A. Something like that.

Q. That's a judgment call that you're making?

A. That's a judgment call.

Q. A couple of the earlier films before we got to 1/0, you're telling us it's pretty obvious they belong in the 1/1 like the first film we looked at, for example?

A. Yes.

Q. But you're satisfied with reasonable probabilities that that film is abnormal and show scarring that you would relate to asbestos?

A. Yes, sir.

MR. RION: This is a clinical data record from Dr. Jana Peters from Princeton, West Virginia, dated 5/8/97, and I'm going to move its admission.

(WHEREUPON, the document referred to was [131] marked for identification purposes as Plaintiff's Exhibit No. 7 and received in evidence and made a part of the record.)

BY MR. RION:

Q. Dr. Gaziano, does your file have a copy of this record?

A. Is it from a—

Q. Jana Peters?

A. Yes.

Q. Do you see Mr. Ayers in the upper right-hand corner?

A. Upper left-hand corner.

Q. Now, these somewhat difficult to read scrawlings, is this typical of what a treating physician might write in records about his patient?

A. Probably better than the way I write because I can read this.

Q. We look down here in the middle of the page, there's a notation of an abbreviation of "DX". Do you see that?

A. Yes, sir.

Q. What does the abbreviation of DX in a medical record mean?

[132] A. Diagnosis.

Q. There's one that says bronchitis; number two it says sinusitis?

A. Yes, sir.

Q. Number three is what?

A. Asbestosis.

Q. Is that a diagnosis that you agree with?

A. Yes, sir.

Q. That appears to have been made in the ordinary course of medical treatment according to this record?

A. It seems that way.

Q. About the documented diagnosis of bronchitis, would you relate that to his asbestos exposure?

A. No, I'd relate it mostly to cigarette smoking.

Q. The cause of Mr. Ayers' asbestosis would be his employment where?

A. Everywhere he was exposed to it, the railroad as well as the automotive maintenance that he did.

Q. Of the two, which do you think is the heaviest and most significant from the records that you've reviewed?

A. Well, it's hard for me to say. I'm just going to say that they're probably equivalent.

Q. Okay. Let's talk about Mr. Spangler. You saw [133] him when?

A. I saw him on 11/15/97.

Q. Tell us what your records show about his dust exposure.

A. He worked as a pipefitter for the N & S, Norfolk & Southern, C & O Railroads from 1942 to '80, except for two years in the Navy. While in the Navy, he had asbestos exposure while living in submarines, on submarines. From 1945 to '80, he worked in the vac shops and roundhouse with heavy exposure to asbestos from steam locomotives and to a less extent on diesel locomotives. He also worked for a few months in powerhouses in which his exposure to insulation from pipes and steam lines and boilers. He was disabled with a back problem in 1980.

Q. Any significant findings on his physical exam?

A. There was decreased breath sounds.

Q. What's the cause of that?

A. That's chronic obstructive pulmonary disease.

Q. So that wouldn't be from dust disease?

A. No, sir.
Q. So, as far as dust disease on the exam, is zero fair?
A. Yes, sir.
[134] Q. What did the x-ray show?
A. It showed irregular opacities in the lower zones and pleural plaques on the diaphragm with calcification particularly on the right side of the diaphragm.
Q. How did you grade this one?
A. I gave it a 1/2.
Q. You said you saw pleural changes, also?
A. Yes, sir. He also has an upper lobe bulla, bullous disease in the upper lobe.
Q. That's from—
A. That's from smoking.
Q. What kind of smoking history did he have?
A. One to two packs a day for fifty years having stopped in 1993.
Q. A very significant smoking history?
A. Yes, sir.
Q. On the other hand, the evidence of scarring in his lungs you're saying was a 1/2 which you're saying is probably greater than this 1 here, is that correct?
A. Yes, sir.
Q. We'll show that in a minute. What did you find on spirometry?
A. He had a moderately severe obstruction [135] impairment.
Q. What's the cause of that?
A. I think smoking.
Q. How about the DLCO?
A. It was moderately decreased.
Q. To—
A. Sixty-six percent.
Q. Let me ask you; did you diagnose—you've already said you diagnosed obstruction from cigarette smoking. Did you diagnose any disease caused by dust exposure?

A. Yes, sir, I think the diffusion is decreased both from cigarette smoking because it's in an advanced stage with bullous emphysema, as well as asbestos.
Q. With reasonable medical probability, did you diagnose asbestosis?
A. Yes, sir.
Q. Let's take a look at this x-ray.
A. Okay. I think this is an interesting one that we can see some things on. I think this particular complete loss of markings, there's no marking here on the extreme upper zone.
Q. That's the black that you can see?
A. The dark or black in about any lung marking [136] that's—see even normally, you expect to see some lung through and that's called bullous emphysema. What that means is all the lung has been destroyed. All you have is a large cyst.
Q. That's from smoking?
A. Yes.
Q. Let me ask you. When you have this bullous emphysema from heavy smoking, Doctor, is that going to make you have more of this scarring that you look for in asbestosis?
A. No, I don' t believe it has. I don't believe it has any relationship.
Q. Those are independent, different facts?
A. Right.
Q. You look up here and you see this black loss of tissue is from emphysema?
A. Right.
Q. Now, show us the portion that you believe is due to asbestos?
A. Well, I think he has quite a bit of disease in these lower zones. Actually, I think it's more than this if you're really going to compare, and that's why I called it a 1.
Q. Well, compare it to the normal and then [137] compare it to the 1.

A. I think that's a little bit more than this, so I would grade this film 1. There's something interesting about this particular person. You see some things down here under the diaphragm next to the stomach that's clamps. So, he's had surgery in his abdomen, but not in his chest. Now, let's see—calcium is very white, chalky white, very, very white. This is a calcium in a plaques here and this is a spicula calcium in the plaques. Now, there is a thin, very white line that extends from here to here, and I don't know if you can see it from there, but it's very thin. That's a calcii plaques. This is also spicula calcium in the plaque and should be sharp like this and that means there is inflammation that's occurred here.

Q. What would be the cause of that?

A. This is a classical calcified plaques of asbestos. Almost nothing else will do that. There's calcium in the diaphragm.

MR. RION: I want you to stay down here a minute with us, Doctor. I've got a record from Mr. Spangler's treating physician that I want to have you help us interpret. This has been marked as Exhibit 8 and it's dated 8/15/95 from the Bluefield Regional [138] Medical Center signed by—reported by L. Milner, M.D. Exhibit 8, we move it admission.

THE COURT: Any objection?

MR. ADKINS: No, Your Honor.

THE COURT: It will be received.

(WHEREUPON, the document previously marked for identification as Plaintiff's Exhibit No. 8 was moved into evidence and made a part of the record thereof.)

BY MR. RION:

Q. We've gone through I believe, Doctor, what the meaning of the interstitial lung disease is?

A. Yes, sir.

Q. Again, asbestosis is an interstitial lung disease?

A. Yes, sir.

Q. If you look on—I'm going to show Mr. Spangler's just to make sure we've got the—James Spangler and the date of birth, date of exam; 8/15/95, and if we look at the findings of the impression: number one, improvement of left lung pneumonia; number two, interstitial lung disease. In your opinion, knowing what you know about Mr. Spangler, what would be the cause of that interstitial lung disease?

[139] A. Asbestos.

Q. Is emphysema as you pointed out to us, the ink-like blackness at the top is that an interstitial lung disease?

A. No.

Q. I've also got here Plaintiff's Exhibit No. 9. This is a report of consultation from Humana Hospital in Kissimmini, Florida, dated 4/13/92. We again put this in as Mr. James Spangler, 4/13/92, Humana Hospital, Kissimmini, Florida. Turn to page two. Under Diagnostic Impression: Patient has increasing respiratory distress with a low grade temperature and productive cough. Patient has had heavy dust exposure. He most likely has an acute, infectious process on top of baseline pulmonary diseases. With the patient's heavy dust exposure, pulmonary infection should be considered. Patient is currently living in a house which is approximately fifty years old.

Then it states, chest x-ray is consistent with pulmonary fibrosis. Is that a finding that you agree with?

A. Yes, sir.

Q. It also says, I suspect the patient has asbestos exposure and may well suffer from asbestos. Is [140] that again a finding that you agree with?

A. Not only do I suspect, I believe.

Q. Yes, sir.

A. Since I have information the radiologist doesn't have or didn't have.

Q. This is again a record which appears to have been generated in the course of his treatment?

A. Yes.

Q. Do you believe Mr. Spangler's asbestos lung disease will progress?

A. Yes, sir.

Q. Do you think he has enough pulmonary impairment from his combined asbestos and smoking to be life-threatening or not?

A. Yes, sir.

Q. You do?

A. Yes.

Q. I believe that's all I have on Mr. Spangler. Hold on a minute, Dr. Gaziano, I need to consult with my colleagues and see how much more I need to ask. I'm about ready to quit.

What do you charge to appear in Court?

A. Three hundred and fifty dollars an hour.

Q. You've been doing work like this where lawyers [141] send you cases and not just lawyers, but lawyers and other entities send you cases and you've got to look at the individual and say, well they've got dust disease for how many years?

A. Well, since I've been in practice since 1969, I did that before as a trainee.

Q. So, you've been—

A. Since, I'd say, since 1965, over forty years.

Q. Over thirty years?

A. Well, I'm thinking about when—let's see, '65, '66, '67—yeah, you're right. I need my arithmetic changed.

Q. Yes. Over the years, what percentage of your income has come from doing occupational disease evaluations?

A. Well, anywhere from 25% to 50%. In recent years, it's been heavier.

Q. How much does that average per year in actual—I'm not asking you to subtract the cost of running your office or

anything like that, the actual billings that you bill out per year for that type work on an average?

A. I think more $450,000,000.

Q. You think if you took the whole thing out, it [142] would be in the millions of dollars?

A. In the millions of dollars, yes.

Q. Then the other roughly 60% of your income over that period has come from other sources?

A. Yes, sir.

Q. That would include what type work?

A. Hospital evaluations, intensive care work, but I have also been very active in consulting with county—and the Department of Labor. Do you mean that separately or—

Q. No, I'm just talking about your total—

A. Rather than the patient care.

Q. Yes.

A. Yes.

Q. Is the amount of money you've earned over the years, Dr. Gaziano, in line with what other top specialists in specialized legal work make?

A. I would think it is, but I'm not sure exactly.

Q. You're not sure what everybody makes?

A. I don't know what everybody else makes, no.

Q. I've got one question. You said that you do screenings where you'll look at a large group of x-rays out of a population of asbestos exposed people?

A. Yes, sir.

[143] Q. When you do these initial screenings and look through out of folks, over the years what percentage in your estimation have you read when you first look at a group of workers to be negative or no dust disease?

A. Well, that depends on which group I'm screening. I have screened people who have had practically none or maybe two or three percent to those who have 30 to 35%. If you screen insulators, you're going to get a very high percentage. If you screen pipefitters, boilermakers you're

going to get a high percentage. You'll get an intermediate percentage if you screen industrial electricians. Also, laborers, it depends on whether they were laborers for industry or otherwise.

Q. But you said the positive findings run anywhere from zero or say one or two percent to how much, the max?

A. Thirty to forty percent depending on who's being screened.

Q. Anywhere from one to forty percent. But any way you'd look at it, over the years the majority of the findings actually have fallen into the negative category?

A. In x-ray screenings—as a matter-of-fact, I [144] specifically prefer not to exam someone in the office unless they have a positive x-ray to save everybody—save my time and everybody else's money. There's no point in examining people who have been screened as negative.

MR. RION: I think that's all I have.

THE COURT: We'll take ten minutes, folks.

(WHEREUPON, a short recess was taken after which the following proceedings were had.)

THE COURT: Mr. Adkins?

MR. ADKINS: Yes, sir.

CROSS-EXAMINATION

BY MR. ADKINS:

Q. Good afternoon, Doctor.

A. Good afternoon, Mr. Adkins.

Q. I just have a few questions and what we're going to so that we can keep these records straight, Baker and I are sort of going to alternate with these individuals, but I don't think that this will take long. Just a few sort of general questions to start with.

When you were talking asbestos progressing, were you talking about that a person who has asbestosis has an increased risk of the asbestos progressing?

[145] A. What I mean is that asbestos at one time was considered to be progressive. Since that time, there's been some literature to show that in certain groups of people it does not appear to progress when you measure the pulmonary function. So, I've indeed seen that myself. While theoretically, asbestos disease is always progressive, I believe in the real world that there are instances where it doesn't progress very much; certainly, not enough to make any clinical difference in certain individuals who I think I've defined.

Q. Are you talking about an increased risk of that happening as opposed to saying definitely in a particular person that is going to happen?

A. Oh, I could never say definitely what's going to happen in anybody individually. Basically, it's really pretty much based upon my opinion which is based upon statistical probability.

Q. That's what I'm getting at. It's an increased risk. In other words, you couldn't say, for example, if I asbestosis, you couldn't say for certain, for example, that my asbestos was going to progress? You can say I have an increased risk of it.

A. Well, I would say that if you have a significant impairment then I believe your asbestos will [146] progress.

Q. Now, let's talk a minute about cancer risks. Cigarette smoking is the number one cause of lung cancer in the world, I guess, would you agree with that, or at least in the United States?

A. Or in the world as well.

Q. If you have a person who has been occupationally exposed to asbestos but is not a smoker, what is the risks?

A. Of cancer?

Q. Yes, of lung cancer.

A. Never smoked?

Q. Never smoked.
A. Never smoked.
Q. Just occupationally exposed to asbestos.
A. It's about five times a nonsmoker which has a rate of a half percent of a nonsmoker, so that would be about 2 1/2%.
Q. I understand that if you're a smoker and asbestos then that risk goes up?
A. It goes up astronomically, yes, sir.
Q. So, it's really fairly rare, then, to see in a person who is occupationally exposed to asbestos who has never smoked that person to develop lung cancer?
[147] A. I said it's about 2 1/2%, one out of forty.
Q. Now, we talked about the American Thoracic Society, and I think Mr. Rion had you, and I think they put it up on their screen here, read from that. I wonder if we could mark this as exhibit 1.

(WHEREUPON, the document referred to was marked for identification purposes as Defendant's Exhibit No. 1.)

BY MR. ADKINS:

Q. Doctor, I hand you this and ask you if you recognize what that is?
A. Yes, sir, I do.
Q. Could you tell us what it is, Doctor, just generally?
A. It's a statement by the American Thoracic Society by a panel of physicians and it's entitled *Evaluation of Impairment Disability Secondary to Respiratory Disorders*.
Q. Is that authoritative, Doctor?
A. Yes, sir.
Q. Is that something that you relied on, I take it, that you read from it earlier?
A. I'm very familiar with it, yes, sir.

MR. ADKINS: At this time, Your Honor, I move [148] the admission of Defendant's Exhibit 1.

MR. RION: I believe this is falls within a category of documents known as one of learning treatises and there's a West Virginia Rule, 800 series, that states as I understand that it can be—it's in evidence and can be shown to the members of the jury and shown to the doctors, yet it's not ruled into evidence as other documents. I assume that Your Honor has treated articles that way in past cases and we'll treat it that way in this case. So, I believe it would be under that Rule.

MR. ADKINS: Yes.

THE COURT: It will be admitted.

MR. RION: No objection under that rule.

(WHEREUPON, the document previously marked for identification as Defendant's Exhibit No. 1 was received in evidence.)

BY MR. ADKINS:

Q. Doctor, would you turn to the last page or next to the last page, I'm not sure. Yes, Summary, there is, I think, a list of criteria for the diagnosis of asbestosis, is that right?
A. Yes, sir.
Q. Would you just go through those for me, [149] please, Doctor?
A. The summary of what is required?
Q. Yes.
A. All right. A reliable history of exposure; an appropriate time interval between exposure and detection; and furthermore, we regard the following clinical criteria to be a recognizable value: chest, evidence of Type STU, small irregular opacifications of a profusion of 1/1 or greater, a restrictive pattern of lung impairment of the forced vital capacity below the lower limit of normal, a diffusing capacity below the lower limit of normal, bilateral lay or pain and expiratory crackles of the posterior lung base not clear (inaudible).

Q. Yes. Now, those are the criteria that the American Thoracic Society says that a doctor in looking at or examining patients with asbestos is what he should look for in making a diagnosis of asbestosis, is that correct?

A. Yes, sir.

Q. Thank you, Doctor. Is asbestos a restrictive disease?

A. If it gets to a certain stage, it will be restrictive. If it gets that bad, then it's [150] characteristically restrictive.

Q. Is it ever obstructive?

A. That's a good question and one in which I think that it is. I think it's uncommonly obstructive, but there is now information in the literature in a couple studies that indicate that it can be obstructive. I personally ascribe most obstructions to cigarette smoking and rarely would I say that's the case unless there is strong evidence that there was no other evidence.

Q. Let's talk about—get your file, if you would, Doctor, of Clifford Vance. Do you have those records, Doctor?

A. Yes, I do.

Q. As I understand it, you saw Mr. Vance on two occasions. You saw him on December 2, 1995 and November 15, 1997?

A. Yes, sir, that's correct.

Q. In your history of December 2, 1995, you had a history of chronic bronchitis and then I notice on your history of November 15, 1997, there was no mention of chronic bronchitis. Had that cleared up?

A. Well, what happens is I have the individual fill out a form and each time they come in and it's [151] placed in the medical history and possibly one time it was indicated that it was present and one time it wasn't. In 1995 it was indicated. He stated that he had it.

I make my own definition, though, by taking a history of cough and expectoration, and then once they—this is 1995. Let me find the questionnaire on the most recent one. Here it is. In 1997, he did not mark that he had chronic bronchitis, so

that's the reasons for that discrepancy, and, also, he said that he did not cough up phlegm in 1997.

Q. Do you think chronic bronchitis or a history of that is from his cigarette smoking?

A. I believe if you have chronic bronchitis and smoke, then I believe that would be the basis of it, yes, sir.

Q. He had a smoking history of one to two packs of cigarettes a day for approximately 48 years, so would that equate to roughly getting close to a 100-pack years? If he smoked 2 packs a day for 48 years, that would be what, 96—

A. I think I have one—

Q. The first time I think he says one to two packs and the second time, he says one to one and a half [152] packs?

A. Yes, sir. I think he's—I would estimate around 60-pack years, 60 or 70.

Q. Is that a significant smoking history?

A. Yes, sir, it is.

Q. What would be the average you would say you would see in people? Is there sort of an average smoking history of a regular smoker?

A. You know, there are those who smoke heavily and those who smoke moderately. Surprisingly, most people smoke about a pack a day, but there is a significant number who smoke two packs a day and a lesser number who smoke a half a pack a day.

Q. Now, in your examination of him, did you find any crackles or rales that you talked about earlier in him?

A. Yes, I did.

Q. You did?

A. I did.

Q. Was it bilateral or on one side?

A. They were on the left.

Q. Just on one side?

A. Yes, sir.

Q. Number four of the ATS guide that we read [153] earlier requires bilateral. Do you agree with that?

A. They recommend bilateral, but all those are recommendations as to a quorum, but unilaterally is also important and is present—

Q. In any event, you didn't find bilateral, is that fair?

A. That's correct, yes.

Q. What was your x-ray reading on—did you x-ray both times that you saw him in '95 and '97?

A. Let me see whether I did. Yes, sir, I believe I did.

Q. Was there—from looking at your records there, was there any change or did you change your reading in any way from '95 to '97 in his x-rays?

A. The '97 was—I'm sorry. It was a little worse in '97, yes sir.

Q. Did you classify him differently?

A. I classified—I'm sorry. The '95 film was at another institution. It was from Bluefield Regional Medical Center and the one in '97 was in my office, and I also did another one in '97 in my office.

Q. My question was whether from the '95 to the '97, did you change your classification of the films that you read?

[154] A. Yes, sir. In '97 it was a little worse than in '95.

Q. How did you classify it?

A. One is a 1/1 and the other one in '97 was a 2/1.

Q. Now, let's talk about the PFTs for a minute. Was there any changes in the PFTs between the '95 and '97?

A. In '95, the PFT was a little less than the one in 1997. That was the difference.

Q. So, basically, they were the same?

A. They were similar.

Q. Now, looking at your 1997 PFTs there, I notice and you indicated, I think, on direct examination that you didn't think that Mr. Vance had any measurable impairment from his smoking as I recall, is that correct?

A. Yes, sir.

Q. Now, looking at the PFTs and the residual volume, is that a little high or not?

A. Not really, not significantly.

Q. Is it up some?

A. No, I would think this was within the acceptable range of normal.

[155] Q. Insofar as the diffusing capacity goes, and I know Mr. Rion asked you about this, but if we use the correction that he asked you about, his diffusing capacity would be normal, is that correct?

A. His corrected diffusion for alveolar volume is normal, yes.

Q. So, in other words, his diffusion capacity corrected is normal?

A. Yes, sir.

Q. Now, Doctor, in terms of impairment—when you say impairment, are you talking about disability?

A. No.

Q. Tell me the difference between impairment and disability so the jury understands that?

A. Impairment means that you have disease that affected your lung by certain amounts and disability means that it's affected your system to an amount that prevents you from doing work. So, disability can vary from individual to individual.

Q. So, when you say someone has impairment, you're not saying that they have disability from doing work, for example?

A. That's right.

Q. So, I take it, Mr. Vance, then, doesn't have [156] any measurable disability from the standpoint of doing work with this mild degree of impairment that you saw?

A. Well, unless he was a very heavy worker, I would say he's not disabled.

Q. Well, he's how old?

A. It really doesn't matter. These values are all age-corrected. So, he would not be considered disabled from his usual work. That's probably the best way to say it.

Q. That was my point. In other words, these would be for a 76-year old person. They've corrected for that, and this would not prevent him, for example, from doing things that a normal 76-year old man ought to be able to do, assuming he was otherwise healthy?

MR. RION: I want to object to what a normal 76-year old man, because I know a 76-year old man who likes to water-ski.

BY MR. ADKINS:

Q. I think average daily activities of most 76-year olds that we know, he could do all of that?

A. Yes, sir.

Q. That's my point. There's no impairment from doing everyday activities.

A. I'll accept that as saying, yes, that's true.

[157] Q. Did you find any restrictive pattern on his lung impairment?

A. No, sir.

Q. Did you find any impairment in his forced vital capacity?

A. Yes, sir.

Q. Those are also on the list of ATS criteria that I gave you. Those are also on that list, is that not correct, Doctor?

A. That list says these items are important and it doesn't say that all items have to be present and that's specifically what it says, that they all don't have to be present. Only two are essential and that's exposure and latency and could be any one or several of the others that are important to making a diagnosis.

Q. Yes, sir. I understand your position. My question was, did you find those things in Mr. Vance and I think the answer was you did not, is that correct?

A. I found certain things in Mr. Vance. I found positive—

Q. I understand that.

A. But I didn't find a restrictive impairment.

Q. That was my question. My question was, did you find a restrictive pattern or any problem with his [158] forced vital capacity and I think the answer was no, is that right?

A. That's correct.

MR. ADKINS: I believe that's all I have on Mr. Vance. Thank you.

THE WITNESS: You're welcome.

MR. ADKINS: I'll let Mr. Baker take the next individual.

MR. BAKER: Good afternoon ladies and gentlemen of the jury. I haven't had an opportunity to introduce myself to you. I'm Rodney Baker and I am with Mr. Adkins. I know I haven't done much yet, but I appreciate the opportunity to speak before you.

BY MR. BAKER:

Q. Good afternoon, Dr. Gaziano. I don't think we've met before today, have we?

A. Nice to meet you, sir.

Q. Just a few questions for you regarding Mr. Shirley. The first guideline on the ATS guideline criteria is a reliable history of exposure, is that right?

A. Yes, sir.

Q. I note in your occupational history section regarding Mr. Shirley, you note that he was a clerk from [159] 1951 to 1976 in yard offices and at times went out in the yard around engines working in the yard and checking cars, is that right?

A. Yes, sir.

Q. You know, at what times he went out and did that type of work?

A. No, sir, I didn't take a day-to-day log of it. I couldn't do that.

Q. Do you know what other jobs he held during his work with the railroad besides those you've listed?

A. Let me just look at the—no, sir, I don't.

Q. From his occupational history, would you please tell me what or describe to me the type of silica exposure that you think Mr. Shirley had while with the N & W?

A. Well, he said he worked in the yard and I specifically remember asking some people if in the yards there was exposure to dust and sand that could cause lung disease, and they said that there was a lot—and I said, is there like sand generated in traction.

Q. Excuse me. Was this with Mr. Shirley?

A. You know, I'm trying to give—the way I gather together information about the various work.

Q. What I'd like to know is what the source of [160] that information was?

A. Well, it came from him that he worked in the yard where sand was placed down on getting engine traction and, also, on some certain of the cars.

Q. Do you know how much of the time that he worked during that '51 to '76 period that he actually spent out in the yard versus working in a building?

A. I just knew that he was in the building part of the time and out in the yard the other part of the time, but in terms of specific division, no, sir, I don't know.

Q. As a car checker, do you know how long he would have stayed in the yard during any one of his days of work?

A. No, sir, I don't know.

Q. Correct me if I'm wrong, it was your understanding that when he worked as a car checker that's when he had exposure to sand, is that right?

A. Yes, sir.

Q. Do you know that he only worked for two to three years—I'm sorry. Doctor, I would like for you to assume for a moment that Mr. Shirley testified that he only worked as a car checker for two to three years on an occasional basis. If you accept that assumption, [161] do you still believe that Mr. Shirley's silicosis that you diagnosed as mixed dust pneumoconiosis is related to or caused by his railroad work?

A. Yes, sir, I do.

Q. Would you classify Mr. Shirley's exposure to silica working around engines that were braking as an intense exposure or just an exposure?

A. I'd say significant. I doubt if it would be considered an intense exposure, no.

Q. I'm sorry. How did you classify that?

A. I'd say I don't think it would be considered an intense exposure.

Q. What type of exposure?

A. A significant exposure.

Q. In your opinion, how many years of significant exposure to silicosis does it take to give a person sufficient exposure to develop silicosis?

A. It may take 5 weeks.

Q. That's with an intense exposure, is that right?

A. Yes, sir.

Q. I asked you about significant exposure.

A. Significant exposure—I don't know. I would think years, but beyond that I'd say I couldn't say.

[162] Q. Will you agree that in a coal miner or someone with a job like that, it generally takes eight to ten years of exposure to excessive levels of silica before that person would be expected to develop a silicosis or a coal worker's pneumoconiosis?

A. I think that it takes a few years. I don't know specifically how many.

Q. So, then, Doctor, if you assume that's true what I represented to you regarding Mr. Shirley's work as a car checker, do you think you have a reliable history of exposure, at least in regards to silica?

A. I believe so, yes, sir.

Q. Doctor, you testified that there was an appropriate interval between the alleged exposure and detection of disease, is that right?

A. Yes, sir.

Q. You believe that the x-ray findings were sufficient to make a diagnosis of some kind of mixed dust pneumoconiosis, is that right?

A. Yes, sir.

Q. Now, if I'm correct, the guidelines that we've been looking at and talking about suggest or recommend a chest x-ray evidence of Type STU, the regular opacities that would be diffusion of 1/1 or greater, is that [163] right?

A. Yes, sir.

Q. In this case, you found that the opacities were of a Q/T type, is that right?

A. Yes, sir.

Q. With the Q, I suppose, representing the predominate opacity?

A. That's right.

Q. And the T representing the secondary opacity?

A. That's right.

Q. When I say predominate and secondary, I mean there's more of the first than there is of the second, is that right?

A. That's right.

Q. Generally, in an asbestosis diagnosis, you'll have either ST or U opacities exclusively, is that right?

A. Yes, sir.

Q. You won't get the rounded opacities?

A. That's correct.

Q. Do you believe that a diagnosis of acute T-type opacities meets the criteria or the recommended criteria set forth as number 1 in the ATS guidelines we discussed?

[164] A. I think it means the criteria, but I didn't make a diagnosis of asbestosis. I made the diagnosis of a mixed dust pneumoconiosis.

Q. I think it was mixed dust pneumoconiosis including asbestosis, is that right?

A. Yes, sir, that's correct, and the reason for that is that this represents two dusts and with both dusts together it's up to 1/1 profusion. Whether one dust alone would get up to that, I have no way of knowing or no way of guessing. So, I evaluated him with what I had which was a mixed dust—opacities of a 1/1 type of profusion. We could probably talk about how many angels dance on the head of a pin and what that represents when you have mixed pattern and the best I can say is that I really don't know what it would like if there were only one opacity. So, I have to deal with what I'm given and what I was given was an x-ray picture and then I tried to explain it as best I could and an occupational history.

Q. Let me make sure I understood part of what you just told us. You don't know in looking at Mr. Shirley's x-rays that you can make a straight diagnosis of asbestosis because you can't say as you sit there today that there were enough opacities to make an [165] asbestosis—enough irregular opacities to make an asbestosis diagnosis, is that right?

A. I wouldn't know unless I could eliminate all around his lungs and then look at the film, and since I'm not able to do that, the best I can say is mixed dust pneumoconiosis including asbestosis. The other thing that I would like to say since you brought it up, if I may, having to do with a 1/1 profusion. Since that was written in '86, there has been a number of opinions related—good opinions to the point now where 1/0 is considered generally, and not generally is a standard for breathing occupational pneumoconiosis including asbestosis.

Q. You mentioned earlier that you had been the past president of the West Virginia Thoracic Society, is that correct?

A. Yes, sir.

Q. Is the West Virginia Thoracic Society connected in any way with the American Thoracic Society?

A. Yes, sir, it's a component organization.

Q. So, as a component organization, does the West Virginia Thoracic Society still adopt and follow these guidelines that you have said are authoritative?

A. Well, I'm not sure whether they do or they [166] don't because we don't spend our time discussing all these except to say that anything in medicine that is authoritative in a peer review journal has—there is an opportunity to question and evaluate and undergo a modification and what I'm saying now is that I have yet to see a study done on asbestosis, have yet to see a study done on asbestos in which 1/0 was not considered positive for asbestosis. There have been innumerable studies even by some of the members of the panel that wrote that article—

MR. BAKER: Your Honor, I'm going to object to this as nonresponsive. The question I asked was, does the American Thoracic Society adopt this as authoritative, yes, no or not sure?

MR. RION: I think he's entitled to explain because he's referencing the people who—what the people who wrote the article have said about what the standard means, and I think he's entitled to do that. I've got the literature he's relying on right here.

THE COURT: I think he should answer the question and he may give an explanation.

MR. BAKER: He's given an explanation. I'd just like for him to answer it now.

THE WITNESS: Well, the answer that I'm going [167] to give is that, no, we don't sit around and review all these because every month ATS comes out with some physician papers that we generally adopt or agree to.

BY MR. BAKER:

Q. Doctor, did you find a restrictive pattern of lung impairment with Mr. Shirley?

A. No, sir, I did not.

Q. But you did find a diffusing capacity which you believe was below the lower limit of normal?

A. Yes, sir.

Q. And you heard what you believe were bilateral rales, is that right?

A. Yes, sir.

Q. You talked about rales earlier. If you have rales in 1995, will you have them necessarily in 1997?

A. Well, it would take time for them to develop, so you may or may not and sometimes if they're restricted in location, you don't have—you may not put your stethoscope over it at that time. That's happened to me before.

Q. So, you're saying it's possible that rales can be present in 1995, but a doctor would examine someone in 1997 and not detect the rales?

A. Oh, no. I think if the rales was due to [168] asbestos, it would still be there.

Q. Doctor, when a diagnosis of silicosis is made at least based on the chest x-rays you've done in this case, is it common to see eggshell calcifications in relation to the silicosis?

A. No.

Q. It's not common, these eggshell calcifications?

A. It's not common.

MR. BAKER: Doctor, I don't think I have any further questions for you at this time. Thank you.

THE WITNESS: Thank you.

BY MR. ADKINS:

Q. Mr. Ayers, Freeman Ayers, Doctor. You saw him, I believe, on November 15, 1997, at the request of Mr. Humphrey's?

A. Yes.

Q. You took a history and in that history, I think you've already testified about this, but anyway, there was apparently exposure outside of his railroad employment at the Ford dealer, and I think you've testified on direct that you thought that was sort of equivalent between the two exposures, is that correct?

A. Yes, sir.

[169] Q. Did you find any other significant, from a medical standpoint, any other significant medical problems?

A. Yes, sir, I did.

Q. You said he had some heart problems?

A. Yes, sir.

Q. Would those heart problems cause shortness of breath?

A. A heart problem can cause shortness of breath, yes, sir.

Q. What other medical problems did you find in Mr. Freeman Ayers other than the asbestosis that you talked about?

A. He has heart trouble. He had gout. He has high blood pressure.

Q. Did you do a—on your physical examination, what do you mean when you say lungs were clear to percussion and ossification?

A. Well, it was normal. Percussion is a technique where you felt the chest to see if there's change in sound that emulates from that. If it's dull, it generally means there's fluid or consolidation. If it's tympanitic it means that there's air underneath. So, that's one method of examining. Ossification has to [170] do with listening to the lungs and listening for abnormal sounds when the person's taking a

breath in and out and rales are one of the things that you look for and maybe one of the things you see in asbestos, among other things.

Q. My question was, were his lungs clear according to what you wrote in your report?

A. Yes, sir.

Q. From that test anyway?

A. Yes, sir, they were clear.

Q. What was the chest x-ray reading on him, sir?

A. 1/0.

Q. Did you find a restrictive pattern of lung impairment? Was the forced vital capacity below the lower limit of normal?

A. No. sir, I did not.

Q. Did you find a diffusing capacity below the lower limit of normal?

A. Yes, I did.

Q. What was his diffusing capacity?

A. Seventy-nine percent of predicted.

Q. So, that's within two points, I guess, of the 81, is that right?

A. Yes, sir.

[171] Q. When you use the correction, again, it would be normal, isn't that true, Doctor?

A. Yes, sir.

Q. Did you find any bilateral laked or pin crackles?

A. No, sir, it was normal to percussion auscultation.

Q. Now, looking at his PFTs. You did find obstruction, did you not?

A. That's right. Yes, sir.

Q. How would you classify the obstruction that you found?

A. As a moderate degree.

Q. His numbers—which numbers there would you look at, Doctor, to talk about obstruction?

A. That would be 1 over FVC of 59.

Q. What was the number?
A. Fifty-nine.
Q. Normal would be, again, 80?
A. No, 67. The normal was in the predicted table.
Q. So, he's below normal in that. You said he had COPD?
A. Yes, sir.
[172] Q. That's from his cigarette smoking?
A. Yes, sir.
Q. Do you think the COPD is affecting his diffusing capacity?
A. As I said earlier, it may play some part in it, yes, sir.
Q. Doctor, I want to hand you what was introduced as Plaintiff's Exhibit No. 7 and I'm going to show you an x-ray. This is where they had asked you about the diagnosis a doctor had made about asbestosis. Look at that x-ray reading. Do you recognize the doctor that did that reading?
A. Doctor Almond.
Q. Do you know if he's a B-reader or not?
A. No, sir, I don't know.
Q. Did he make any findings of interstitial fibrosis or note any in his x-ray findings there?
A. No, sir.
Q. Assuming that he's a B-reader, would he be required to do that?
A. Well, I think any radiologist should say that what they see. So, I don't know if he's a B-reader or not.
Q. In any event, he made no comment in this [173] particular x-ray that he read about any interstitial fibrosis, is that true?
A. Yes, sir.

MR. ADKINS: That's all I have on him. Thank you, Doctor.

BY MR. BAKER:

Q. Doctor, do you have the report for Mr. Doyle Johnson?
A. All right.
Q. Once again starting with your occupational history which was taken, I guess, November 15, 1997, the date of his exam, is that right?
A. Yes, sir.
Q. Is the date of your report the date of the exam or the date you finished the report?
A. The date that I saw him was the date of the report, the same day in this instance. Not always, but it happened to be the same day.
Q. In your occupational history section or in the occupational history section and I think you read to the jury before, you indicated that he operated a rock cleaner with exposure to a lot of rock dust over the years, is that correct?
A. Yes, sir.
[174] Q. Do you know how often Mr. Johnson was involved in dumping ballast?
A. Operating a ballast regulator?
Q. Right.
A. His job was largely a machine operator for his whole time according to what was written, but he alternated from one machine to another, but specifically how long he did one machine versus another, I don't know, no.
Q. Do you know much time Mr. Johnson worked as a welder's helper and didn't work on machines?
A. No, sir.
Q. In looking at his occupational exposure, where would you believe or in doing which one of these jobs would you think he got most of his exposure to sand while employed by the railroad?
A. Oh, I think operating the ballast regulator is a very, very dangerous occupation and they just bring large volumes of unprotected dust exposure. A ballast regulator is a very

dangerous machine. Ballast can also create dust, tamping, that is the brooms as well, and the one thing about these people who do road maintenance, even if you don't operate it, you work next to someone else who operates it and they're all [175] unprotected. So, they have suitable opportunity to be exposed to sand.

Q. Do you believe that all maintenance of weigh employees are unprotected?

A. Well, I know they were unprotected.

Q. Did you ask Mr. Johnson?

MR. RION: Your Honor, I believe Dr. Gaziano was in the middle of an answer and was interrupted by counsel. So, I ask that he be permitted to finish his answer.

THE COURT: Yes.

MR. BAKER: My point is, I asked a simple yes or no question, and I get a three minute answer.

THE COURT: Let's hear whether it's going to be three minutes or not.

BY MR. BAKER:

Q. Go ahead.

A. Do I know whether he was protected?

Q. Yes.

A. I have a good idea, but I don't know specifically. I didn't ask him.

Q. That's not a question you ask people who come in for pulmonary evaluations, if they wore any type of face masks or—

[176] A. I already know the answer to that question generally because I've been talking to a number of these people over the years, and I already known the answer. I don't have to ask them if they were protected.

Q. So, if Mr. Johnson had testified in his deposition that he did wear a dust mark when he operated the ballast regulator that would surprise you, wouldn't it?

A. It would depend on when he was given the dust mask. For a period of time, I don't believe he was given a mask for that kind of work.

Q. Once again, do you think you have a reliable exposure history in this case?

A. I think I have an excellent exposure history in this case, yes, sir.

Q. You indicated that he first went to work in the early '50s, is that right?

A. Yes, sir, '52.

Q. So, there has been an appropriate interval or latency period, is that right?

A. Yes, sir.

Q. Doctor, in this case you made a diagnosis, I believe, of mixed dust pneumoconiosis including asbestosis once again.

[177] A. Yes, sir.

Q. Would you please turn to your chest x-ray interpretation report, the ILO form?

A. Yes, sir.

Q. Look at the section labeled 2B Small Opacities?

A. Yes, sir.

Q. You have marked the primary T and the secondary S, is that correct?

A. Yes, sir.

Q. Those are both irregular opacities?

A. That's right.

Q. Not rounded opacities?

A. That's correct.

Q. Didn't you tell me just a minute ago that you would have made the diagnosis of a mixed dust pneumoconiosis if you had an exposure to silica or coal and some rounded opacities?

A. Silicosis as opposed to asbestos can be low zone and can be irregular. So, I want a designation of the type of pneumoconiosis one has, one has to look at the exposure history in making that diagnosis. It's not just the x-ray. It requires knowledge of what kind of dust one was exposed to.

[178] Q. So, then if somebody—just make that a hypothetical plaintiff who worked around all kinds of different dusts and you saw irregular opacities in the lower zones, you could call it asbestosis or mixed dust pneumoconiosis depending on what he was exposed to?

A. That's exactly right, yes, sir.

Q. Did you find a restrictive lung impairment in Mr. Johnson?

A. No, sir.

Q. What was his diffusing capacity?

A. Sixty-four percentage of predicted.

Q. Did you note any rales?

A. No, sir, there were no rales.

Q. Is that the same thing as bilateral lay or pain and inspiratory crackles?

A. Yes, sir.

Q. Were you ever provided any medical records of any information on Mr. Johnson regarding to the pulmonary embolus that he suffered in 1987?

A. I didn't get any history on that, no.

Q. Would a pulmonary embolus in 1987—be consistent with the pneumoconiosis?

A. No.

Q. Doctor, I noticed in looking at your tests [179] results in these cases that you didn't perform any post bronchodilator pulmonary function tests, is that correct?

A. Yes, sir, that is.

Q. In your physical exam of Mr. Johnson, you didn't note any abnormal breath sounds, did you?

A. No, sir.

Q. You did consider a smoking history of 30-pack years to be a significant smoking history, didn't you?

A. Yes, sir, I do.

Q. I believe earlier in your direct testimony you attributed the mild obstructive impairment that you found—to the mixed dust pneumoconiosis that you diagnosed and to Mr. Johnson's cigarette smoking, is that right?

A. Yes, sir, that's correct.

Q. There's no way you can say or did you say earlier which one caused it more?

A. No, sir, I didn't.

MR. BAKER: Doctor, I don't think I have any further questions regarding this plaintiff.

BY MR. ADKINS:

Q. Mr. Spangler. Let's talk about your physical exam of Mr. Spangler for a minute. Did you find any [180] find any rales in Mr. Spangler?

A. No, sir, I did not.

Q. Did you find any restrictive pattern of lung impairment with a forced vital capacity below the normal lines of normal?

A. No, sir, I did not.

Q. Looking at his PFT's, he has a significant obstructive pattern, doesn't he not?

A. Yes, he does.

Q. That's from his cigarette smoking?

A. Yes, sir, I believe it is.

Q. He was the gentleman, I think, who had the upper lobe emphysema mass, bullous emphysema, is that right?

A. Yes, sir.

Q. That's all caused by his smoking of cigarettes?

A. Yes, sir.

Q. Do you believe that—what about the diffusing capacity?

A. It's moderately reduced, 66% of predicted.

Q. If corrected to 78?
A. Yes, sir.
Q. It would still be below normal?
[181] A. Yes, sir.
Q. Do you believe that the cigarette smoking and the extensive damage in his lungs from cigarette smoking is contributing to the reduction in his diffusion capacity?
A. To a certain extent, yes, sir.

MR. ADKINS: That's all I have, Doctor. Thank you.

BY MR. BAKER:

Q. Doctor, you talked earlier about the impact that asbestos exposure would have or had in your opinion on Mr. Carl Butler. Do you remember testifying regarding Mr. Butler?
A. Yes, sir.
Q. The part of your testimony that I want to focus on is when you made the point, I believe, that all exposure to asbestos would be akin and would to some extent cause his disease, is that correct, would cause the disease that you diagnosed?
A. Yes, sir.
Q. Doctor, obviously if he had three months work for the railroad, 33 or so, which I believe is what you noted in your history section, working as a plumber and pipefitter in powerhouses and various other industries, [182] would you, at least, believe he had significant asbestos exposure, is that right?
A. Yes, sir, I do.
Q. I'm going to rephrase my question. Obviously, if he worked three months on the railroad and 33 years in these other occupations where you believe he was exposed to asbestos, do you believe his railroad exposure played a very minimal role in the development of any asbestos-related disease that he had?

A. I think it was a minimal role. I don't know how much, but I think—am I allowed to elaborate or not or just say yes or no. You tell me.
Q. To the extent that you can answer these simple questions, I'd prefer a yes or no.
A. Well, I'll elaborate or I'll just shut up. You tell me.
Q. That's the answer I wanted you to give.
A. Well, I wanted to please you.
Q. I like to be pleased.
A. Okay.
Q. Now, Doctor, you didn't have any exposure to sand or coal dust or any other substance from Mr. Butler during his railroad employment, is that right?
A. That's correct.
[183] Q. Did you make a mixed dust diagnosis in Mr. Butler's case? You did, didn't you?
A. Yes, sir, I did.
Q. So, he had or at least the opinion you're proceeding on is if he had no exposure to coal or silica on the railroad, then that obviously didn't add to his mixed dust diagnosis?
A. That's right.
Q. Earlier you were shown a report or chest x-ray interpretation by Dr. Michael Alexander, is that correct, regarding Mr. Butler?
A. I don't recall. I've been shown so many things, I don't know specifically.
Q. I'll show you what's been previously marked as Plaintiff's Exhibit 6. Do you know who Dr. Alexander is?
A. No, sir.
Q. You don't know his qualifications, either?
A. No, sir.
Q. You didn't find a restrictive pattern of lung impairment with a forced vital capacity below the lower limit of normal, did you?
A. No, sir.

Q. I believe Mr. Butler's diffusing capacity with [184] carbon monoxide was normal, is that right?

A. That's right.

Q. In Mr. Butler's case, the only type of breathing damage you found was a mild obstructive ventilatory impairment, is that right?

A. Yes, sir.

Q. Do you think the mild obstructive ventilatory impairment that you diagnosed Mr. Butler with would keep him from engaging in the normal activities of life?

A. If you define normal activities as what's usual for someone his age, I would think that it would not impair him. No, sir.

MR. BAKER: Thank you, Doctor. I don't think I have any further questions.

REDIRECT EXAMINATION

BY MR. RION:

Q. Just a little follow-up. On the American Thoracic Society statement that we went over earlier, I believe, Defendant's 1 and 2. Can we put this on the—

A. Yes.

Q. Where the numbers begin under the summary right there, okay. Are you familiar enough this that if I read it you know where I am?

A. Let me just say this; I could read the whole [185] thing from here without looking at it.

Q. Come on up and let's get number one—stop. I want to read—it says, in our opinion it is necessary that there be, number one, a reliable history of exposure and, number two, an appropriate time interval between exposure and detection. Now, the appropriate time interval, is that what we call latency?

A. Yes.

Q. Now, when it says, it is necessary, what does that mean?

A. Well, that's absolutely necessary before I can even think about an opinion is you have to be exposed to the dust, harmful dust, and then it has to be a long enough period of time before it can develop.

Q. So, the two things you've got to have are listed under necessary?

A. Yes, sir.

Q. Now, let's keep going. Furthermore, we regard the following clinical criteria to be of recognized value. So, then they—how many is this, one, two, three, four, four different things of recognized value. Are they saying that you have to have all four of these?

A. No, sir.

Q. That's why you've got one and two that are [186] necessary and then you move on down to helpful for the next four, correct?

A. Absolutely.

Q. That includes—we went through that. Basically, on almost all our cases we had the chest radiograph.

A. Right.

Q. The restrictive pattern by and large we didn't have?

A. That's right.

Q. Then, diffusing capacity we had in practically every case?

A. Right.

Q. Then, bilateral rales we had in some and not in others?

A. And sometimes it was unilateral, but again even if the unilateral and you've got an x-ray and they did the work, you have to ask yourself, why are those rales there. They don't belong there. They're not normal.

Q. Really, if you've got nothing but number one and two that were necessary, exposure and latency, and the chest x-ray, that would be enough?

A. Right.

[187] Q. Now, I want to ask you about this 1/1. You said something about that in every study you've ever seen, a 1/0 has been recognized as abnormal for asbestosis, is that correct?

A. Yes.

Q. Are you familiar with the fact that one of the authors of this very statement has written a letter about this issue of whether a 1/0 is, in fact, sufficient?

A. Yes, sir.

Q. This is, for the record, diagnosis of asbestos-related disease, a letter from Hans Wile one of the authors of the statement, dated June 1987, and if we'd start at the bottom of page one, it says, "No one category will constitute the lower limits of abnormalities which is diagnostic of asbestosis for all qualified readers. For one reader this level will be more or less equivalent to an ILO reading of 1/1 for irregular opacities or another 1/0. So, is it saying here, Doctor, that a 1/0 can be sufficient?

A. Can I expand on that or just say, yes.

Q. Well, it might be better for you to say yes or no.

A. Yes.

[188] Q. It says here that it is unfortunate that some readers have interpreted the ACCPATS statement, and that's what we just looked at, right?

A. Right.

Q. To suggest that a reading of at least 1/1 for small opacities is required to support a diagnosis. Now, do you agree with that unfortunate suggestion?

A. It is very unfortunate and it is no longer considered.

Q. That's one of the authors of the statement?

A. Yes, sir.

Q. You were asked about a couple of these gentlemen being able to perform the normal activities of daily life for someone their age. Does that include things like getting dressed, bathing, taking a walk, that type thing?

A. Yes.

Q. Those are the things they can do, correct?

A. Yes, sir.

Q. But they still have, at least, the gentleman who has the DLCO impairment, still has some impairment in their lung function when they go about?

A. Well, no one has asked me about him. He's got a lot of impairment.

[189] Q. I'm just talking—

A. That individual has a lot of impairment.

Q. Yes, sir. I'm—

A. He probably couldn't do ordinary daily things.

Q. But even the gentlemen who can do daily activities do have measurable lung impairment?

A. Yes.

Q. According to the tables that we've talked about, you'd have to be as bad as the worse five percent to have any measurable abnormality at all of the subject population that's studied to set the tables?

A. Yes, sir.

Q. For those who've developed that much impairment, in your opinion, those with any degree of measurable impairment, their impairment will probably worsen over time?

A. Yes, sir.

Q. Now, we've referred over and over—not over and over, but a couple of time, to the so-called corrected diffusing capacity. Again, I want to make sure that everybody understands that if we take somebody and remove a lung, they're corrected diffusing capacity is going—so-called corrected—we can have corrected, but it's corrected for loss of alveolar [190] volume, right?

A. Yes, sir. Is it appropriate for me to expand that with a marker.

Q. I think we've been through it once. Everybody sort of has the idea and, again, just a reminder, if you lose one lung corrected for alveolar volume, your so-called corrected diffusing capacity would be?

A. A hundred percent.
Q. A hundred percent?
A. Yes.
Q. So, if we want to measure impairment do we use the corrected for alveolar volume diffusion?
A. No, you use the absolute diffusion.
Q. This will be an issue, Dr. Gaziano, and will have to be resolved as Mr. Butler testifies, but if he had exposure to significant airborne respirable silica or coal at the railroad, would to the extent that he had the exposure, would that have been some contributing factor, however slight, to his pneumoconiosis?
A. Yes, sir.
Q. He'll testify hopefully in a few minutes. Certainly any asbestos exposure would have contributed to the asbestos component of that?
A. Yes, sir.

[191] MR. RION: That's all I have.

THE COURT: Thank you, Doctor.

THE COURT: Folks, we'll take ten minutes.

(WHEREUPON, a short recess was taken after which the following proceedings were had.)

THE COURT: I was trying to get terms identified and I failed to get a couple of them identified and a couple of jurors asked about them. It's forced vital capacity and FEV1.

BY MR. RION:

Q. Dr. Gaziano, I'm going to get you to define what FVC and FEV1 are just to help clarify this. I think Mr. Adkins and me may have been at different points talking about the same things, but using different terms.

When you and I went through the cases, remember we used the spirometry at different points; that I would write down,

history, x-rays, spirometry, diffusion. Is the FVC and FEV1 part of the spirometry that me and you were talking about?
A. Yes, sir.
Q. Could you define what the FVC and the FEV1 are?
[192] A. Let me just show it. A picture is worth a thousand words and they won't forget the picture.
Q. Do that.
A. Well, basically spirometry—

MR. ADKINS: Unless I'm mistaken, that's not one of the markers for that board.

MR. RION: These?

MR. ADKINS: Yes.

THE WITNESS: The way you do spirometry is you take—you're connected to a breathing machine that has air in it and it has a ballast that goes up and down and it has a marking pen that marks. So, when you suck in the ballast goes down and when you blow out the ballast go up and it moves on a rotating drum. So, what it does on this rotating drum—as it moves around it marks out. So, here the drum is not moving and you're asked to take in a deep breath. Then they start the drum rolling and then they ask you to blow out as hard and as fast as you can and you'll get a line like that, and there are lines like this on that and then there are lines like this.

Now, FEV is the total amount that you can get out after a forced expiration. It's called forced expiratory volume. Now, if each one of these lots [193] represent one liter, and I'm going to make it easy for you, how many liters did this person get out? What was his FEV?

So, it's the total amount he gets out after one large breath. So, that's what a FEV is, the total amount of air you can get out after one breath. So, this individual did a 1, 2, 3, 4, 5—let's just say 5 liters, and if you're trying to determine whether that's normal or not, you have to compare it with a

standard and it may be—normal might be 4.8. So, the number you're going to get is, say, 105%. So, 80 to 100% is normal.

The other thing is the FEV1 is the amount of air you get out in one second. So, if this slide from here to here is one liter, from here to here is one second. So, you look and see how much air an individual got out in one second, but you look on this particular—so, how much did he get out; 1, 2, 3 liters. So, that's the FEV1, forced expiratory volume subscript 1 which is forced expiratory volume one second, the amount that you get out in one second.

So, when we talk about a restrictive disease, we talk about people who get most of their air out all right, but doesn't get the total amount. That's a [194] restrictive impairment and, so, the total amount they get out, the amount they should, would be less.

If they have an obstructive impairment, then they have a problem getting it out because—So, this person gets out 30% in one second, 30% of the total. He's restricted. This person got the amount that he should have gotten out. Got it?

MR. RION: May Doctor Gaziano be excused?

THE COURT: Sure may.

(Witness excused.)

TRIAL TRANSCRIPT
April 16, 1998

Butler Testimony

* * * *

[194] MR. RION: I call Mr. Carl Butler.

THE COURT: If we run by you with a term like that again, just ask and we'll get the answers for you.

(Witness sworn.)

THEREUPON came,

CARL BUTLER,

one of the plaintiffs herein, after having been first duly sworn to tell the truth, testified as follows:

DIRECT EXAMINATION

BY MR. RION:

Q. How are you doing this afternoon, Mr. Butler?
A. Fine.
Q. If you would, to get started, I'd like for you just to tell the members of the jury your full name.
[195] A. Carl Butler.
Q. Are you married, Mr. Butler?
A. Yes, sir.
Q. What is your wife's name?
A. Mary Elaine.
Q. How long have you and Mary Elaine been married?
A. Forty-seven years.
Q. How long?
A. Forty-seven.
Q. I'm going to swing the microphone into you just a little bit and ask you to speak up just so everybody can hear you.
Where do the two of you live?

A. The address is HC 78, Pipestem, West Virginia.

Q. How long have the two of you lived down in Pipestem?

A. Nine years.

Q. Does the place where you and your wife down in Pipestem have any special significance to you?

A. Well, it was where I grew up mostly.

Q. The only family home?

A. It was since '49.

Q. How many acres do you have down there in [196] Pipestem?

A. A hundred and eighty.

Q. Do you have what you consider to be sort of a farm down there?

A. Yes, sir.

Q. What do you have on your farm; is it the basic chickens and cows and stuff like that?

A. Cattle and a few chickens.

Q. Anything else you do on the farm down there?

A. Plenty.

Q. I believe you and your wife probably raised a houseful of kids down there, too, didn't you?

A. We had seven and raised nine.

Q. Do you have any great grandkids?

A. I have nine.

Q. Do you have any grandkids? Did you tell me the grandkids first or the great grandkids?

A. Grandchildren.

Q. Okay. How many great grandchildren do you have?

A . I have five.

Q. How many is that total if you count them all up?

A. I didn't count them.

[197] Q. A lot of them?

A. Several.

Q. Do you need the big farm down there for a family reunion?

A. I sure do.

Q. Just for a little bit of background; would you tell the jury, please, sir, where you were born?

A. I was born in Mercer, I think in Bluefield, West Virginia.

Q. Did you go to school down there?

A. Yes, sir.

Q. How far did you go in school?

A. Twelfth grade.

Q. When did you graduate from school?

A. '49, 1949.

Q. Were you ever in the military?

A. No, sir.

Q. How tall are you?

A. I'm five nine, five eight and a half.

Q. How much do you currently weigh?

A. Two twenty.

Q. Have you ever smoked cigarettes, Mr. Butler?

A. Yes, sir.

Q. When did you start smoking?

[198] A. Oh, when I was about—about '49, '50.

Q. About 1949, 1950?

A. Yes, sir.

Q. Do you recall when you quit smoking?

A. About '65.

Q. I'd like to show you if I could, sir—it's a copy of a medical record from down at the Princeton Community Hospital. I'd like to show it to you and ask you to take a look at it.

A. Yes, sir.

Q. Do you recognize the date down at the bottom being a date from 1986?

A. Yes, sir.

Q. Who was the doctor down there that was seeing you in 1986?

A. Oh, I can't see—that was—

Q. Does it look like Dr. Wardren?
A. Wardren, yes, sir.
Q. What did he see you for in 1986?
A. A cataract on my eye.
Q. Do you see the upper part of the document here where I've highlighted some ing in yellow?
A. Yes, sir.
Q. Do you see where it says, smokes one pack of [199] cigarettes per day?
A. Yes, sir.
Q. Can you explain if you quit in '65 why there's a medical record in '86 that says you smoked a pack a day?
A. There must have been a misunderstanding there because he might have asked me if I ever smoked and how much, but I definitely didn't smoke at that period of time.
Q. You weren't smoking at all in 1986?
A. No, sir.
Q. No question?
A. No question in my mind.
Q. I want to talk to you if I could about your railroad employment. When did you first go to work for the railroad?
A. In '51, to the best of my knowledge.
Q. Which railroad was that for?
A. Virginia.
Q. Was it eventually bought out by the Norfolk & Western?
A. Yes, sir.
Q. What geographic shop did you work in when you went to work in 1951?
[200] A. The machine shop.
Q. Was that down in Princeton?
A. Princeton.
Q. In 1951 when you went to work for the railroad, how long a period of time did you work for them?
A. Approximately three months.

Q. What was your particular job title during that three-month period?
A. I was a machinist apprentice, and I was taking measurements for bolts and sleeves in the engines, making them and putting them in all the engines.
Q. During that three-month period, did you do anything other than just general work on the locomotives?
A. No, sir. That was other than making the—lathes, little pins.
Q. How much of your work during that period of time actually doing repair work to steam locomotives?
A. All that time.
Q. Was anybody else working on the steam locomotives at the same time you were?
A. There were a lot of people.
Q. What were they doing to the steam locomotives, [201] the other people?
A. They were repairing, covering the insulation, whatever needed to be done.
Q. The jury has seen this picture several times. When you talk about insulation work and repair work, is this picture kind of represent the kinds of things you saw going on in the shop during that period of time?
A. Yes, sir, I saw some of it.
Q. The picture is Plaintiff's Exhibit No. 17-1 just for reference.
Did repairs that the boilermakers were doing on the steam locomotives require the jackets to be removed off the steam locomotives?
A Yes, sir.
Q. Would you have been around in the shop while that was being done?
A. Yes, sir, I was in the shop back and forth in the area there.

Q. How many steam locomotives could they actually have inside the shop at any given time down in Princeton to be worked on?

A. I don't know how many they could get in there, but they generally had one. If they had one outside, I don't know.

[202] Q. Did you ever—were you ever actually when you saw the asbestos being removed from the steam locomotives?

A. I've saw it on the floor.

Q. Were you ever around when folks were sweeping up or cleaning up after the asbestos had been removed?

A. Yes, sir.

Q. When you were working on the locomotives, where were you generally working on the locomotives, and I guess by that; were you generally the person that was on top somewhere or were you down underneath the locomotive?

A. I was underneath.

Q. During the three-month period of time that you were working in the rail shops down in Princeton, was it a dusty work environment?

A. You could see dust at times. Sometimes it was real dusty and sometimes it wasn't as bad.

Q. Was it visible in the air, at times you could see it?

A. At times.

Q. Do you believe during that three-month period of time that you were exposed to asbestos in the air at the Princeton shop?

[203] A. It was there. I couldn't say.

Q. After that three-month period of time, did you ever work for the railroad again at some time later?

A. Yes, sir.

Q. When was that?

A. In '66 and '67.

Q. Does it more like maybe '56 and '57?

A. Yes, sir.

Q. Where did you work for the railroad during that period of time?

A. I worked at the car yard.

Q. What specific facility, was it back at Princeton?

A. Princeton.

Q. What did you do—what was your job title and what did you do in the car yard?

A. Well, I burnt some and welded some, drove rivets,—rivets along the sides. They had some jobs you could bid on. If you wanted to change jobs, you had to bid on it. If you got it, you got it.

Q. How much do you remember about the specific things that were going on in the car shop while you were there?

A. Well, we worked three shifts. I worked second [204] shift part of the time and third shift part of the time. We had old stoves in there they burned coal in, just an old potbelly stove we stood around and other than that, we were putting cars together, sides is mostly what I was doing on the night shift, riveting sides.

Q. Was there any coal or coal dust in the work environment in the shop when you were working?

A. Some out of those old stoves because we were building new cars in there. It wasn't as much as it was outside.

Q. How much coal or coal dust was there outside the shop?

A. Well, they was fooling out there in the yard about all the time when it was windy.

Q. Did they actually keep coal somewhere in the area, though?

A. No, it was just where the coal cars come through there all the time.

Q. That's something that you would have been exposed to?

A. I suppose so.

Q. Do you know whether or not you were exposed to any asbestos products in this '56, '57 time period?

A. No, sir, I don't know I was ever exposed, but [205] some of those pipes were insulated, but I couldn't say.

Q. What type of pipes are we talking about?
A. About heating pipes.
Q. Steam pipes?
A. Yes, sir.
Q. Other than your work at the railroad, were there other places after you left the railroad that you worked where you would have been exposed to asbestos?
A. Yes, sir, it's possible.
Q. Would you name some of those places for us just so the jury can be familiar with them?
A. I worked at the Princeton powerhouse, down at Mitchell powerhouse, MM Virginia powerhouse. I worked at Cardinal powerhouse, John Amos, but Cardinal and Mitchell powerhouse was new. There wasn't as much insulation there at it was in the other three.
Q. So, besides the railroad there were other places where you would have significant asbestos exposure?
A. Yes, sir.
Q. What year did you actually retire for good when you weren't working for anybody any longer except yourself, maybe, down on the farm?
A. In '94.
[206] Q. Let me go back just a second to the two periods of time when you were working for the N & W Railroad. That's the three-month period in '51 and then back in '66 and '67. During that period of time, did anyone at the railroad ever tell you that there was a health hazard from being exposed to the asbestos?
A. No, sir.
Q. Did anyone at the railroad talk to you or instruct you about how to make the use of asbestos safer?
A. No, sir.
Q. Did anyone at the railroad ever recommend that you ought to wear a respirator while you were working around the asbestos?
A. No, sir.

Q. Did they come in and take an x-ray to see if your lungs had any damage or not?
A. No.
Q. Did you ever see anybody take any dust measurements at the railroad while you were there?
A. No, sir.
Q. Do you recall when you were first diagnosed with asbestosis?
A. Yes, sir.
[207] Q. When was that, what year?
A. I think around '91, '90 or '91. I don't know the exact date.
Q. Did you have any idea prior to that period of time that you might have an asbestos disease or some type of lung disease?
A. No, sir.
Q. Since 1991 to today, do you feel like your breathing has gotten better or gotten worse?
A. It's gotten worse.
Q. What are some of the types of things that you do in your daily routine that you feel like you can't do as well today as you used to because of your breathing?
A. Well, there's quite a few things. Any amount of things, like putting up hay. I don't have the wind that I used to have or I was trying to carry a block of salt the other day about fifty yards, but I had to put it down about three times before I got there, minor things.
Q. Do you consider the kinds of things that you've done down on the farm to be fairly physical type activities?
A. Most of it.
Q. Have you—say, in the last five or six [208] years, have you done anything to sort of help accommodate you being able to do those easier?
A. Well, I've had to go buy equipment to do it.
Q. Tell the jury why and what you mean by that?

A. Well, you've got hay to put up and I can't do a lot as I used to. I can't pick up a bale of hay higher than my knees. If I work over ten to fifteen minutes and I've got to sit down. You can't get any help, anybody to help you. So, you've got to buy equipment to do your work. That's about the size of it.

Q. When you say you went out and bought equipment, what did you buy and what did you do to change, for instance, how you bale the hay?

A. Well, I had a buy a round baler instead of a square baler.

Q. Explain the difference, what you mean by a round baler and a square baler and what that is.

A. Well, a square baler is a baler that bales hay and drops it on the ground, about a fifty pound bale, and you have to pick it up and move it on a truck and haul it to the barn.

Q. Is that the little small one that you see sometimes when you go to the county fair or something like that just sitting there?

[209] A. Yes.

Q. Okay.

A. I bought a round baler and you just rake it over behind the tractor and it just picks it up and rolls it up and you come back with a tractor and pick it up and take it where you're going instead of picking it up, manhandling it.

Q. Did you ever do any hunting when you were growing up?

A. Yes, sir.

Q. How did you use to hunt?

A. Well, I used to hunt about all the time. I don't do any hunting anymore. I can't get around over the hills.

Q. Do you ever do any hunting off the front porch anymore?

A. Not this year.

MR. RION: Yes, ma'am. I'm sorry.

JUROR: How old is Mr. Butler?

MR. RION: I'm sorry. Tell the jury how old you are, Mr. Butler.

THE WITNESS: Sixty-six.

MR. RION: I apologize. I should have asked that question.

[210] BY MR. RION:

Q. Do you still try to keep a garden?

A. Yes, sir.

Q. Can you do your gardening as well as you used to?

A. No, sir.

Q. Tell me what is different?

A. Well, I just hoe about half a row and have to sit down and rest awhile or get—I'll rest a while and then start again.

Q. How long has it been since you started having to sort of take the breaks when you did that?

A. The last two or three years, it seems—it's getting worse, but it's not getting any better.

Q. Because of your exposure to asbestos, do you have any concerns that you might develop a cancer from your asbestos exposure?

A. Yes, sir, I do.

Q. Is it something that worries you?

A. Well, my mother had cancer with the breast and taking care of her and watched how she suffered. I just don't want to go through that myself. I had a son that died with colon cancer. I've been through it and I know it's painful. I don't want to scare them if I'd have to [211] go through it.

Q. What do you worry about the most as it relates to your concerns about cancer?

A. Well, if I go there's nobody to take care of the farm or anything. Mostly, it's just going through the suffering and pain.

MR. RION: That's all the questions I have for you, Mr. Butler. I'm sure we're going to have a few questions from—

CROSS-EXAMINATION

BY MR. BAKER:

Q. Mr. Butler, we've met before, haven't we?
A. Yes, we have.
Q. A couple occasions, didn't we?
A. A couple times.
Q. What, one afternoon and one morning, wasn't it? Is that about right?
A. It was two afternoons, wasn't it?
Q. Was it two afternoons, okay, yeah.
A. Yeah, it was two afternoons.
Q. I just have a few questions for you. You talked a little bit earlier when you gave your direct testimony about getting short of breath when you were carrying a salt block. Was it fifty yards, is that what [212] you told me, was that what you said?
A. It was about, I'd say, fifty yards.
Q. Is that a twenty-five pound salt block you're talking about?
A. I'm talking about a forty pound.
Q. You were also talking a little bit about getting out of breath when you went up hills and not being able to hunt and things like that, do you remember that?
A. Yes, sir.
Q. When we talked about that in your deposition, do you remember telling me some other things that kept you from being able to hunt including your rheumatism and your arthritis?
A. Yes, sir.
Q. Is that still true?
A. It's still true.
Q. So, were you in the room when Dr. Gaziano gave his testimony?
A. Yes, sir.

Q. Did you hear Dr. Gaziano talk about your work as a pipefitter and a sheetmetal worker and how he categorized that as thirty-three years of fairly significant exposure to asbestos-containing products?
[213] A. No, sir, I didn't hear him mention anything about sheetmetal.
Q. Okay. You were a pipefitter, right?
A. Right.
Q. Well, I'll tell you why I said that. Some people on the railroads, pipefitters and sheetmetal workers that's the same job, but obviously in the pipefitter industry where you worked that's not true, is it?
A. No, sir.
Q. You worked outside those powerhouses you told me about just a moment ago, you worked in a lot of other places like schools, industrial factories and places like that, didn't you?
A. Yes, sir.
Q. The type of work that you were doing was always pipefitter work, is that right?
A. Yes, sir.
Q. And my understanding of your work as a pipefitter, what you did was you would go in plants and either install new pipes for air control systems and in some cases steam pipes, boilers, hooking up the lines to boilers. Does that fairly summarize what you did as a pipefitter?
[214] A. Yes, sir.
Q. Are there any other types of different jobs that you did as a pipefitter? You did tell me you welded some, too, is that right?
A. Yes, sir.
Q. Now, in most of these places that you worked and I've got about two pages of them because that's what we spent most of our two days talking about, wasn't it, all the different places you worked as a pipefitter?
A. Yes, sir.

Q. In most of those places that you worked, you would go in and replace the old pipe after the insulators or someone like that was pulling the insulation off, is that right?

A. Yes, sir.

Q. I understand that sometimes you worked with pipes that wasn't insulated, is that right?

A. Yes, sir.

Q. I believe you told me that generally the insulators or—I guess it would be insulators, were in front of you taking off the insulation and you come from behind putting in the new pipe, is that right?

A. Yes, sir.

Q. There were some occasions and I don't want to [215] get down into the specific jobs that you did because we could be here for a week, but there were some occasions where you would actually remove the old pipe and the insulation that was on the pipe yourself, is that right?

A. Just on rare occasions. If there was a spot there they missed or something, I'd knock it off, yes, sir.

Q. Now, those insulators when they removed that insulation, they'd just let it drop to the ground?

A. They would let it fall and a man would pick it up.

Q. What does that insulation that we've been talking about generally look like? Is it chalky white?

A. Well, it depended on what kind of fluid was going through the pipes. Steam pipes was chalky like colored, something similar to what's on that board, and some of it was just like this—what do you call it. Like I say, I'm not an insulator, but—I'm not familiar with all of it. The different types of pipe depending on what was going through it, they had different types of insulation.

Q. I'm sorry. I didn't hear the last part.

A. Different types of pipe, depending on what was going through, they had different types of insulation.

[216] Q. During the time you worked the three-months or so—working out of the machine shop in Princeton, you never actually worked on the boilers themselves, did you?

A. On that picture I can show you, but on the boiler—

Q. Is it my understanding that you were working up underneath?

A. Yes. I can show you where I worked mostly. I mean, what my work was. Actually on these rods here and stuff that pulls and turns the wheels, all these rods. I replaced the bushings and the pins in there.

Q. There at Princeton where you were working in the machine shop, that wasn't what they called the vac shop, was it? That was just the car shop where you worked, correct?

A. No, sir, the machine shop was right beside the round house. They pulled the engines into the end of the machine shop to be repaired.

Q. Do you know the difference in the round house and the vac shop, don't you? Are those two words different to you?

A. Not really.

Q. At or around the machine shop where you [217] worked, they didn't take the whole jacket off the boiler, completely strip the boilers down and put completely new insulation on the boilers, did they?

A. Not the whole thing at that time.

Q. They were just doing running repairs there?

A. I'd say. Yes, sir.

Q. Now, in your deposition, I believe we finally agreed that you worked somewhere between 21 and 23 total months for the railroad, is that right?

A. Twenty-three.

Q. Mr. Butler, you were asked some questions a moment ago about if you were ever warned about the use of asbestos on the railroad or if you were ever required to take a chest x-rays or if you ever saw anyone taking any dust meas-

urements while you were on the railroad. Do you remember those questions?

A. Yes, sir.

Q. During your work as an insulator, do you remember or can you tell me the first time that you believe you ever saw any type of sign at any of the places that you worked warning you that you should avoid areas because of asbestos use?

A. I don't—repeat the question there. You said as I worked as an insulator.

[218] Q. I'm sorry, as a pipefitter. I should have phrased that better. I'm not meaning to confuse you.

A. Well, you said insulator.

Q. During your work as a pipefitter, when was the first time that you can remember ever seeing any type of sign warning you that you should avoid a particular area of a plant or building or something like that because asbestos was used there?

A. Well, I don't remember any particular time, but I can remember times where they were tearing insulation out was college that they barricaded the door. They didn't want you to go through there.

Q. Do you remember working at Wesvaco or Covington?

A. Yes, sir.

Q. Was that one of the last places you worked before you stopped working?

A. No, sir.

Q. When did you work at Wesvaco and Covington?

A. I think it was '64.

Q. You're not sure when you worked—

A. I believe about '91.

Q. '91?

A. That's close.

[219] Q. Do you remember when you were at Wesvaco and Covington seeing a sign warning you not to use a particular door because they were removing some asbestos in there?

A. They was tearing some asbestos off along the driveway and they had it barricaded off and you had to go around.

Q. Can you ever remember seeing any warning about asbestos in any of your work as a pipefitter before that time?

A. No warnings, no, sir.

Q. You belonged to a union when you were a pipefitter, is that right?

A. Yes, sir.

Q. Did the union or any of the employers that you had during the time that you worked as a pipefitter ever ask you or require you or suggest to you that you get chest x-rays on a regular basis?

A. No, sir.

Q. Did the union or any of the employers that you had during that time period ever ask you to have pulmonary function tests taken or breathing tests?

A. No, sir.

Q. Do you know or do you ever remember seeing [220] anybody take any dust measurements at any of the places that you worked after you left the railroad?

A. No, sir.

MR. BAKER: I thank you, Mr. Butler. I think that's all I have for now.

MR. RION: Just a couple of quick follow-ups.

REDIRECT EXAMINATION

BY MR. RION:

Q. You were asked just a few minutes ago about the forty-pound salt block. Did there used to be a time when you could carry that forty-pound salt block fifty yards?

A. One under each arm.

Q. You just can't do it any more, can you?

A. No, sir.

Q. How often do you do something in your daily activities that makes you notice your shortness of breath?

A. Every time I go out to the barn or I have to walk up the creek—I guess it's about 75 yards. It's uphill, but I didn't pay any attention to it. If I go up there now, sometimes I have to stop and when I do I'm plumb out of breath, things like that and I was out on the hill the other day, on the hillside, and I just made [221] it back to the house. Of course, it was awful steep around there, but it's got to where I can't walk a distance. I just have to stop and get my breath, things like that.

MR. RION: That's all the questions.

MR. BAKER: I don't have any follow-up questions, Your Honor.

THE COURT: Mr. Butler, you may step down.

(Witness stands aside.)

THE COURT: Do you all want to call your next witness?

MR. RION: It's going to be a coworker and it may be a good place to start—not a coworker, but a plaintiff. I don't know what time you're going to break, but he'll be substantially longer on my part. I move that you continue—

THE COURT: Do you want to call it quits for the day?

MR. RION: Now would be a good time.

MR. ADKINS: Right. Are we on schedule?

THE COURT: I've got two things tomorrow morning. It won't do much good for you to come in until about quarter after, so 9:15 we will start again.

(WHEREUPON, the jury was excused for

* * * *

TRIAL TRANSCRIPT
April 17, 1998

Ayers Testimony

* * * *

[3] MR. BOITER: Call Mr. Ayers, Your Honor.

(Witness sworn)

THEREUPON CAME,

FREEMAN RAY AYERS

who, having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. BOITER:

Q: How are you this morning, Mr. Ayers?
A: Fine.
Q: Are you ready to go?
A: Ready to go.
Q: Okay. Could you tell the jury, please, sir, your full name?
A: Freeman Ray Ayers.
Q: This first question I want to get out of the way this morning, Mr. Ayers, because I don't want to mess up the afternoon, tell the jury how old you are.
A: Seventy.
Q: Are you currently married?
A: Yes, sir.
Q: How long have you been married?
[4] A: Oh, since 19—July 29, 1950, about forty, almost fifty years.
Q: Do you and your wife have any children?
A: I have two adopted children.
Q: How old are your two adopted children?
A: Oh,—

Q: They're not here in the courtroom today are they?
A: No, sir.
Q: Okay.
A: If they were here they'd expect me to remember that.
Q: Let me ask you this, I've been asking everybody and we sort of seem to have a wealth of them, do you have any grandkids?
A: Yes, sir. I have four.
Q: Do you have any greatgrandkids?
A: I've got four greatgrandkids, and one that I raise that's no kin to me.
Q: So, family reunions are pretty big for you, too?
A: Right, right.
Q: Where do you and your wife currently [5] live?
A: We live in Princeton.
Q: How long have you lived down in Princeton?
A: Since 1940.
Q: Would you tell the jury a little bit about your education, how far you went in school?
A: I went to the eighth grade.
Q: And what year did you leave school?
A: I can't remember exactly.
Q: Well, let me ask you this question: After you left school in the eighth grade what did you do?
A: I worked on the farm to help my parents.
Q: Did there come a time when you went into the military?
A: I went into the military in '43, I believe it was, '42 or '43.
Q: What did you do in the military?
A: I was in charge of base operation on the airstrip—airfield.
Q: What kind of duties did those entail?
[6] A: That was taking care of the fire department, the crash crew, radio operator, instruction on giving the planes to land when they'd land and take off.

Q: How long were you in the military doing that kind of stuff?
A: I was in the military two years, eleven months, and thirteen days.
Q: You got that one right.
A: I know.
Q: Let me back up just for a second and cover one more piece of background I forgot, have you ever smoked cigarettes?
A: Yes, sir.
Q: When did you start smoking cigarettes?
A: I guess when I was about eighteen—seventeen or eighteen.
Q: How long did you smoke?
A: Well, off and on.
Q: Do you recall—let me ask you this question: When did you stop smoking?
A: Well, I'd stopped three or four times.
[7] Q: When did you stop the last time?
A: About four months ago—five—about four months ago.
Q: Okay. During the period of time that you'd been smoking on and off, what's the most you ever smoked?
A: Maybe two packs a day.
Q: Did you also smoke less than that during that period of time?
A: Yes, sir.
Q: What's the least per day you think you smoked?
A: Maybe a pack.
Q: What did you do when you left the military?
A: I went to school.
Q: How long did you go to school?
A: Well, let's see,—no, when I got out of the military I went to work on the railroad.
Q: Okay.
A: I got a job at the Princeton shop on the Virginian.

Q: And that was about 1940-what?

[8] A: Well, '46, I believe it was, '46, '47 I worked there.

Q: What was your job at the railroad when you started with them?

A: I was a mechanics helper.

Q: Where were you working, where did you start working for the railroad?

A: The Virginian shop.

Q: Does it have a—I mean, is it Princeton, Bluefield, where?

A: Princeton.

Q: What department did you work in as a mechanics helper?

A: Building railroad cars.

Q: Would you sort of describe for the jury the process—what you did building cars?

A: Well, I bucked the rivets in.

Q: Okay.

A: We was building the cars completely.

Q: How about tell me and the jury what bucking rivets is?

A: Well, that's catching a red hot rivet in a cup and sticking it in a hole and putting a [9] dollybar on it, and the mechanic on the other side would brad the rivets up.

Q: And what was the purpose of doing that?

A: Hooking the car together, welding the sides and the metal together with rivets.

Q: So that's what held it together was the rivets?

A: Yes, sir.

Q: Did you—during the period of time, '47 when you started, did you do anything else besides your working the car department?

A: Yes, sir. I would help out in an emergency when somebody was layed off in the engine department where they'd reworked on the boiler on the locomotive.

Q: What type of work was being done in the boiler shops?

A: They was completely overhauling.

Q: Okay. We've shown the jury a couple of photographs. Is that—does that look kind of like what was going on in there?

A: Yes, sir.

Q: Backing up for a second, when you were [10] working in the car department did you ever, yourself, personnally work with any asbestos products?

A: Not unless I'd go work on the engines, on them.

Q: The actual process of making the cars you didn't use asbestos?

A: No, sir.

Q: In the shop were there any overhead steamlines?

A: Yes, sir.

Q: Were there any—did they have an overhead crane in those shops?

A: There was two of them.

Q: How about describing for the jury what an overhead crane is and what would happen when it was used?

A: Well, they would pick up as we would—one area would build the sides of the cars and this crane would pick it up and take it down and bring it—cross it over for us to assemble the car onto the main frame of it, and they would rivet it together. Then they would put pins through it to hold it together and then we would ream it.

[11] They would be—as you come down, it's like an assembly line, and when they'd come down the assembly line one guy would ream it and then we'd put the rivets in and then rivets it all together.

Q: Physically, how did an overhead crane operate in a building? How was it setup to work?

A: It was on tracks, and it run all the way the width of the shed, there, two of them. One on each side.

Q: Okay. As—when the overhead crane was in use what would happen to the building and to the steampipes?

A: It would vibrate.

Q: When it was used and when it was vibrating back and forth across, did it create any dust in the shops?

A: Of course.

Q: Why?

A: Because of the vibration in it.

Q: How big is an overhead steam crane?

A: It wasn't—the crane wasn't steam, it was electric. It run like a streetcar. It had wires along the side that he got his juice and his contact [12] from, but it would run backwards and forwards across the track, itself.

On the crane when they—and we wasn't—in other words, when it was a moving we made sure we was in the safety, that we couldn't be nowhere near where that would fall or break on us. Do you know what I mean? It was for our own good. We done it ourselves, you know.

Q: I'm trying to speak up. I think you misunderstood my question. How big, physically, was a steam crane?

A: Steam crane?

Q: Not a steam crane, I'm sorry, the overhead crane, how big was that?

A: It was big enough to pick up a whole railroad car and move it after it was assembled.

Q: During the periods of time that you were in the boiler shop, what other type of craft people were in there working?

A: They was boilermakers and mechanics.

Q: What was the boilermakers actually doing in the shops?

A: They was reworking, putting new flues into the engine, completely overhauling them. [13] Rebuilding them from the ground up.

Q: Okay. Did you ever see the boilermakers using the block material?

A: Yes, sir.

Q: What would they be doing with it?

A: They'd be placing it on or taking it off the engine.

Q: Did they ever insulate the engines with anything other than the block?

A: Where they couldn't get a block around a section, like this chair, if you couldn't put a block around it, they would wet the asbestos, mix it up from a powder form and pass it on and around the ceiling to make sure everything was—had asbestos on it and sealed it before they put the cover over it; the jacket.

Q: Were you around these folks when they were applying or removing the blocks?

A: Yes, sir.

Q: Did that process create visible dust?

A: Yes, sir.

Q: Were you around the folks when they were mixing up the mud?

A: Yes, sir. I have mixed it.

[14] Q: Did that process create visible dust?

A: Yeah, if you—yes, sir.

Q: Would you—was the mixing of the mud something that you did a little bit or a lot when you were over there in those shops?

A: The only time I would be involved in it would be when one of the regular crew would lay-off and they'd use us for an emergency, you know, like you say we need a man up there, a laborer or a helper, and we'd—they'd move us from one job to another.

Q: Did you ever help any of the folks actually remove the asbestos off the steam locomotives?

A: No, sir.

Q: What were you actually doing to help in the removal process?

A: Well, we would—in other words, them big—they take them off and let them fall onto the floor and we get them and put them in a buggy-like thing and roll them—roll them out

from the outside where they would—then somebody else, you know, would dispose of them more.

Q: Just sort of estimate for me, how far [15] was from where they were throwing off of the steam locomotives to the floor where they were thrown, do you know about what the distance was?

A: Well, it's the heighth of an engine, eight, ten feet. They was big old locomotive's, the big one.

Q: When they'd throw it off, it hit the floor, would it be dusty?

A: Yes, sir, and some of it would just deteriorate, do you know what I mean, the blocks, when it hit the floor, it would just go into like a powder.

Q: How long did you work the car department/boiler shop job?

A: The car department I worked about two-and-a-half years. In the car department and the boiler, you know what I mean.

Q: Uh-huh.

A: As a laborer.

Q: What did you do next after that?

A: Well, I got layed off there and I went to school. I went to air condition/refigeration school. I went to shop foreman school in Kansas City to learn to be a body man and a shop foreman. Then I went to—[16] well, I went to Pittsburgh to air condition/refrigeration school, Kansas City for specializing in automatic transmissions and stuff. Because I didn't have the education I wanted and the government was a paying for it so I took use of it, and then, in the '50's I went to work at Elmore. I got a job braking on the yard.

Q: Okay. Who were you working for at Elmore?

A: I was working for the Virginian in Elmore.

Q: Did you go in doing refrigeration work to take care of your—from your education or was it something else?

A: Well, I just—there was no work in the refrigeration business so I got a job on the railroad.

Q: What did you start doing at Elmore?

A: I was a yard brakeman or a humprider, what you call a humprider. It's the same thing. The brakeman and humprider was—they could use you either way, you know.

Q: Explain to the jury, if you would, what [17] a brakeman or a humprider is, as you call it.

A: Well, a humprider, they had a hill that they would shove the cars up over it. They was separating the cars, one going east, west, you know what I mean, different tracks, and they would cut these cars off and you would ride them down this hill into these certain tracks to make up the trains that was going, well, we call them up the hill and down the river.

Down there, that was our short way of telling, you know, east and west, and then a brakeman, you would take them trains and move them around, switch them around and set them up.

Q: As a brakeman did you do any work out on the lines of the railroad?

A: No, sir.

Q: Did you do any work in the shops?

A: Not in the—not after I went to breaking.

Q: Okay. During the period of time that you were doing brakeman work, do you believe you were exposed to any asbestos containing product at the railroad?

A: Well, all of the steam engines was [18] covered in them, you know, in that.

Q: Explain to the jury, if you would, the way you would've been exposed to asbestos as a brakeman.

A: Well, the vibration of the engine and the trains, we was setting in a little compartment about,—oh, I bet it's a bit further than this, the cab of the engine that you would sit in, and the boiler was right here in front of you, and the vibration, that dust would come off and come back into the cab.

Q: Would the trains be under power, is what you're talking about?

A: Yes, sir. Yes, sir.

Q: During the period of time that you were brakeman, did you ever take any of the engines into any of the shops?

A: Yes, sir.

Q: Okay. When were you doing that?

A: Well, when we got a dead engine, I'd worked from Elmore, and if they needed a brakeman in Princeton, we just switched around, do you know what I mean? Wherever they needed us we went. And when I'd work the Princeton shop, when we'd take a dead engine, we may put it into the repair shop, into the shop where [19] they rebuild them, at the turntable.

We take and sit them up on the turntable and they'd turn this table and they'd take the engines off from whichever room, you know—they was dead. They wouldn't run. We'd have to place them into the repair shop where they was going.

Q: Would you actually physically go into the shops then?

A: Yes, sir. We had to go into the side—into the shop where they rebuilt them.

Q: Was the shop at Princeton the same shop you'd gone to before that you were telling us about?

A: Yeah, it was an old Virginian shop.

Q: Were they still doing any of the same kind of things that they were doing when you were there before?

A: Yes, sir.

Q: What were they still doing at that point?

A: They were still building and rebuilding the engines, building the locomotives from the ground up—rebuilding them from the ground up.

Q: Were they still applying asbestos?

[20] A: Yes, sir.

Q: Still removing asbestos?

A: Yes, sir.

Q: Were they still mixing up the mud?

A: Now, I didn't, you know what I mean, as a brakeman I didn't get in—after I started braking, all I'd do is switch them and put them in, wherever they wanted them, you know what I mean.

Q: I understand, and I'm not talking about you, but were there other people who were doing those kinds of things in the shop while you were there?

A: Yes, sir.

Q: Would you see, when you'd go into the shops at that point, would you see dust from what these folks were doing?

A: Yes, sir.

Q: How long did you work as a brakeman?

A: I had ten years—about eleven years service as a brakeman.

Q: So about 1961, '62?

A: Yes, sir.

Q: During that period of time, did the railroad also begin phasing in the diesel engines?

[21] A: Yes, sir.

Q: Would some of your work as a brakeman have been on the diesel engines, also?

A: Yes, sir.

Q: During the period you worked from roughly 1947 to 1962, did anyone at the railroad ever tell you that asbestos was hazardous?

A: No.

Q: Did anyone at the railroad ever talk to you about ways to use asbestos more safely?

A: No, sir.

Q: During the entire period you worked at the railroad, did they ever make respirators available to you?

A: No, sir.

Q: Did the railroad ever come to you and say, "We want to take a chest x-ray to find out if your lungs are injured."?

A: No, sir.

Q: Okay. Do you recall ever seeing anybody taking any dust counts or dust measurements while you were working at the railroad?

A: No, sir.

[22] Q: Did you ever work for the railroad again after 1962, '61, '62?

A: No, sir.

Q: What did you do after you left the railroad in '62?

A: I had—when I was cut off and on on the railroad I went and had my own body and paint shop.

Q: Did you actually work for a Ford dealership for a short period of time?

A: Are you—

Q: Did you work for a Ford dealership at one point in time?

A: Yes, sir. I worked for Andy—was shop foreman and service manager for Andy Clark Ford.

Q: Okay. Do you remember about when that was?

A: I can't remember the exact date.

Q: How, just generally, how long was it after you left the railroad do you think that you did that?

A: Well, I put—built my own business in '67, I started my own business. So, it was '64 and 5, I guess, that I worked at—

[23] Q: When you were at—when you worked at the Ford dealership did you use any asbestos products?

A: No, sir, not then because we had all spotwelders and stuff.

Q: Do you ever recall, during your bodyshop days, using some powedered asbestos to put on the panels?

A: Yes, sir. Yes, sir. Now, we used that.

Q: When would that have been?

A: Well, when I—see, I was shop foreman. I didn't have—I wrote the estimates and set the jobs up for the men to do—for the body men to do, and I didn't go back in the shop

and actually do any welding and work. Now, I done it in my shop.

I mixed the—where we'd weld the panel together I'd mix the—had the asbestos that I put on the panel to keep it from warping when we welded it.

Q: When did you start the spotwelding process where you didn't use that?

A: Oh, in the '70's, later '70's.

Q: Okay. Are you currently taking any medications?

[24] A: Yes, sir.

Q: What are you taking medications for right now?

A: Well, for breathing, blood pressure, gout. I take seven pills a day.

Q: For the stuff you just told us about?

A: Uh-huh.

Q: Have the doctors ever told you that you have a lung disease from your exposure to asbestos at the railroads?

A: Yes, sir.

Q: Do you recall when you were first diagnosed?

A: I believe it was '91.

Q: Did you know, prior to 1991, that you had an asbestos lung injury?

A: Well, I figured they was something wrong because I was getting short of breath.

Q: Okay. Did you know it was asbestos before 1991?

A: No.

Q: When did you first notice yourself having problems with shortness of breath?

[25] A: It was after—well, I noticed it before '91, and after—it's getting worse now.

Q: What did you think it was to start with?

A: I did not know. I didn't know what it was.

Q: Do you recall how you first noticed that you were starting to get short of breath?

A: Well, I couldn't mow the grass, I couldn't walk, go up a hill.

Q: Has it continued to get worse?

A: Yes, sir.

Q: How have you sort of noticed it getting worse?

A: Well, there's a lot of things that I can't do that I used to do.

Q: Would you sort of talk to the jury about what those are?

A: Well, I can't walk no length of distance.

Q: How far do you think you can walk without getting short of breath today?

A: Maybe a block, block-and-a-half.

[26] Q: Did you have a shortness of breath episode yesterday walking to the courthouse with Mr. Pauley?

A: Yes, sir.

Q: Tell the jury about what happened?

A: Well, we was coming from the motel—or the hotel up to get in his car for him to bring me over here. He wanted—they first told me I could walk from my hotel over to here, which I knowed I couldn't do it, and me, and him was a walking up to the parking lot for his car and it started to rain and we had to pick it up and take it a little faster.

I didn't think I was going to make it. I had to stop a second and rest because I couldn't—

Q: Did you ever used to do any fishing?

A: I used to have a big twenty-eight foot Bayliner fishing boat.

Q: Where did you used to go fishing?

A: Up in New York, down in Santeak, Tupper in North Carolina, up in Lake Erie and in Cleveland.

Q: Is that something you used to like to do a lot?

A: I used to love it, but I got—I just [27] couldn't do it. I didn't have the wind and the strength to put in a—pull in a thirty pound salmon or twenty pound fish—catfish. So I just—I sold my boat and all my—biggest part of all my heavy equipment—fishing equipment.

Q: Do you have any concerns, Mr. Ayers, that you might develop a cancer from your exposure to asbestos?

A: Well, they say I might.

Q: Does it worry you or concern you any?

A: Well, I have an insurance policy that I've had for years for cancer, if I get it.

Q: Have you tried to do anything to sort of be prepared for the worst?

A: Yes, sir.

Q: What have you done?

A: Well, I paid off the Ranger.

Q: Is your wife here with you today?

A: No, sir.

Q: Why is she not here with you today?

A: Because I don't want her to know all this stuff.

Q: You don't ever talk to her about it?

[28] A: Oh, we talk but not that.

MR. BOITER: That's all the questions I have for you, Mr. Ayers. You've answered the questions. Thank you.

(WHEREUPON, direct examination was concluded as the testimony continued.)

TRIAL TRANSCRIPT
April 17, 1998

Shirley Testimony

* * * *

[3] MR. PAULEY: We call John Shirley.

(Witness sworn)

THEREUPON CAME,

MR. JOHN T. SHIRLEY

who, having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. PAULEY:

Q: Mr. Shirley, could you state your name for the jury, please?
A: John T. Shirley, Jr.
Q: And, how old are you, Mr. Shirley?
A: Sixty-nine.
Q: Where do you live?
A: Monroe County, West Virginia.
Q: That's down in the southern part of the state?
A: Yes, sir.
Q: How long have you lived there?
A: Approximately twenty-five years.
Q: Twenty-five years. Are you married?
A: Yes, sir.
Q: Is your wife here today?
[4] A: Yes, she is.
Q: What is her name?
A: Charlotte Louise.
Q: Does she go by Charlotte or Louise?
A: Charlotte.
Q: Charlotte?

A: Yes, sir.
Q: Do you and Charlotte have any children?
A: Yes, sir.
Q: How many children do you have?
A: Four boys.
Q: Four boys, and do you have any grandchildren?
A: Yes, sir.
Q: How many grandchildren do you have?
A: Seven.
Q: At your youthful age, do you have any great grandchildren?
A: Not yet.
Q: Not yet. What grade did you complete in high school?
A: Eighth grade—ninth grade.
Q: Ninth grade?
[5] A: Yes, I did.
Q: And have you had—did you go any further?
A: After I quit that year—I had missed some during my days when I was going to school on account of my legs and my feet, and I lost out quite a bit. So, I dropped out and then I was drafted in '50—1950 I was drafted into the service, and when they got me in there and found out my legs was messed up, well, they didn't keep me for just about ninety days and then sent me home.
Q: So the extent of your military service was ninety days?
A: About ninety days, and I got an honorable discharge. I took a GED test.
Q: What happened to your legs?
A: Well, when I was six years old we were seining for minnows and I was the guy that scooted my feet in the water and I stepped on a bottle and cut my ankle and shivered it. Back then they didn't have the things they have in this day and time, so, they done the best they could, but that wasn't good enough. I had too much fallin' down on me, my ankle fell out of the [6] socket. My foot was in real bad shape.

Q: Does your foot still bother you today?
A: Yes, it does.
Q: Mr. Shirley, you worked for the N&W Railroad?
A: Virginian, originally, first, and then the N&W.
Q: That became part of the N&W Railroad?
A: Yes. 1959 the Virginian merged with N&W.
Q: And when did you start working for the railroad?
A: September 15, 1947, I performed my first duty.
Q: When did you retire?
A: They retired me on disability in '76, I believe it is, to the best of my ability.
Q: You worked from '47 to '76 for the railroad?
A: Yes, sir.
Q: Did you work for any other employer during that time?
A: No, sir.
[7] Q: You were retired on a disability?
A: Yes, sir.
Q: Explain that to the jury.
A: I transferred into Bluefield, West Virginia, and I was called a caller, and the caller handled the mail for the train. I got myself all together and I went to grab a bag and throw it up on my shoulder to carry it down and it was overweight, and I messed my back up when it bent me over. But I went on performing and when I got off I had to go have it checked and they put me in the hospital and put me in traction.
Q: And so you were then retired on disability?
A: They retired me on that.
Q: When you were hired in at the railroad in '47 what was your initial job title?
A: I was hired to be a clerk and a yard master, is what I was hired—I was to be trained for, but when I went out to go to work for. A few days went by, after I was there watching and observing what I was supposed to be trained for and a cab supply job came open and they didn't have nobody—nobody to fulfill it [8] and they needed a man, and I ask them, I said,

"Let me go over there and start there", and the new yardmaster says, "Is that what you want to do?", and I said, "Well, I can start. I can always work up". And that's the way you did on the railroad, and he said, "All right". So I started cab supplying.
Q: Now, what other job titles did you hold in your twenty-nine years of service?
A: Car supplyman, labor, yard clerk. I worked some chief clerk on the side, yard checker, crew dispatcher, extra gang foreman, warehouse foreman.
Q: And did you do these jobs, like, go from one to the other, or did you have—go back and forth to these jobs, or why did you switch so much?
A: It was like a position—when a position would come open they would put it up for bid, and some jobs paid more than the other jobs and you, you know, you kept looking for the best work, and then when you go to that job, should anything occur or anything that—you see what would come open, maybe the man was off sick or something would happen, if you go to that job and take that then he was—he'd get better and come back he could just kick you off. Then you'd have [9] to look for another job and go back to another job. So, you was variously moving all the time in all these departments.
Q: You said you were a yard clerk and a clerk and all that?
A: Yes, sir.
Q: I think of a clerk as someone who sits in an office behind a desk. Is that what a clerk on the railroad does?
A: Well, that's probably like a checker. It's still a clerk. Foreman at the warehouse, he's still a clerk. See, we're all clerks. We belong to BHRC, the Brotherhood of Railway Clerks, and we were all in the clerical department. We're in what they call, I believe it's the transportation department. I'm not for sure.

Q: So, most of these jobs you've held were under the title of a clerk—some type of clerk?

A: Yeah. Yes, sir.

Q: Did that type of work involve being out in the railroad yard?

A: Oh, yes, sir. Yes, sir.

Q: Which of these job titles that you've [10] mentioned, and you mentioned quite a few, but which of these would involve exposure to dust—dusty conditions?

A: I'd say my greatest—most greatest exposure to the dust would be in the years I worked as a laborer at the stationhouse. It's a transfer station where cars come in from everywhere and we have to go down and open the cars up and go in and shift merchandise from different cars going in different directions.

So, if we have a car going—well, just in any direction, we'd have to go in there and set stuff up. And if there's more stuff in there going in the direction we're going we'd leave it in and just take the other stuff out and put it in the other cars, and in doing this we handled all kinds of asbestos materials.

We handled sheets of asbestos. We handled rolls of asbestos. We handled—and this was all open, just like you buy insulation today, in a roll.

Q: Now, as a yard—you mentioned a yard clerk. Were exposed to any levels of dust as a yard clerk?

A: Yes, I was. I'd be checking on leads, [11] and we'd get dust from the engine, dust from the coal. We had dust from the sand where the engine would be shifting cars. And my job, when I checked on the lead, I would be, maybe, six feet, five feet from where the train would go by me shifting the cars. And as it would come up here to shift the cars and stop to leave it to roll down the tracks, I'd have to be standing here getting the numbers of the cars as they went by; and the engine was up here and cut them off and stopped right there in front of me. And they would sit—drop sand from the sandboxes down the rails, which would give them traction for

the engine to move, and we'd get dust from that. We'd get dust from the cars, and that's mostly where we got it.

Q: So, you've mentioned three basic types of dust here to the jury. You've mentioned asbestos, sand, and you've also mentioned coal dust. Is that the primary types of dust you were exposed to?

A: Yes, sir. Yes.

Q: Let's—let me start out, I want to discuss these. Let me start out with the asbestos, you mentioned you were a car supply man, you handled asbestos?

[12] A: Yes.

Q: As I understand your testimony, cars would come in and you would transfer the—

A: Yes, sir.

Q: —materials, would that be like a box car?

A: Yes, sir. Well, the boxcar was put in a little warehouse with a track running down each side and a center platform, and they put twelve cars—let's see, twelve, either twelve, I'm not for sure, twelve or ten cars in here—come up in the yards; and what we'd have to do, our job was to go in there and open all them cars up, get the numbers down. And open all the cars up and then go in them and take the lading invoices of what was loaded in the cars, and then we'd determine what had the most of what in it. So we'd know which car we was going to have to get what out of, and we'd crack the car open where they'd shift it and banged it up in the yard. It would have damaged stuff all in it inside.

We'd get bags of asbestos. We'd get fifty pound bags, one hundred pound bags. We'd get cans that we shipped in a dust form. And what we'd have to do is push a two-wheel cart in there, and there were four of [13] us working. We had two loaders and two wheelers.

The boys that was wheeling, the other two was loading. I was in the loading capacity, and we'd reach down and pick it up.

Q: You're talking picking up a bag?
A: A bag of asbestos.
Q: Is this a bag of powder asbestos?
A: Yeah, well, like it'd need to be mixed.
Q: Okay. So you said cement. Is that like a cement bag?
A: Yeah, it's like a cement bag. You, you know, if you'd pick up a bag, as far as that goes, any kind of a bag that's got dust or anything in it, you'd pick it up and lay it over here or push it over, you're going to get some out of the sides of it, see.
Q: Okay.
A: But this was a whole lot thicker than that. I mean, you can get more from this because these have been shifted anyhow, and you—sometimes we'd find them that were busted open and we'd just have to clean it up, and show it as damaged.
Q: So these bags, when you move them [14] around, they were kind of dusty?
A: Yes, sir.
Q: And how many bags are we talking about you'd have to transfer, on the average?
A: Well, it could be, on the average, anywhere from fifty to one hundred, depending on what location it was going to and who had it ordered and where we was shipping it to.
Q: Could it be more than one hundred?
A: It could be more than one hundred. We shipped to all the lumber companies, all the mining companies, and just about anywhere that used material. We'd have to set up a car and ship it to them.
Q: Could you see that dust in the air when you were throwing those bags around?
A: Yes, sir.
Q: And you said it also came in sheets, I believe?
A: Four-by-eight sheets, if I'm not mistaken. I'm pretty sure it was four-by-eight sheets.
Q: Were those sheets very dusty?

A: The sheets weren't that bad, not that bad dusty. No, sir.
[15] Q: Now, were they wrapped up in paper?
A: No, sir.
Q: Just open sheets?
A: Just like you'd go by a piece of sheet rock. It was about the same size as a piece of sheet rock. It would come in by the sheet, like about a four-by-eight sheet.
Q: But it wasn't as dusty as the powdered bags?
A: There was dust—a little dust on them but not like you would—you wouldn't get the big dust spray that you would off the other stuff.
Q: Now, if I'm correct, you said earlier that sometimes the load would shift and the bags or the cans would be—have bust—would be busted?
A: Yes, sir. They sure did.
Q: Could you explain that to the jury?
A: Well, in shifting cars around on the engine—yard engine, you know, you go up here and you shove that and then you cut it off and you bounce that and you're going to shift it. Well, with the cars packed the way they are, inside the car, it can shift the materials.

[16] Sometimes we'd open the door and the stuff would be just spilled all over the car. We'd have to go in there and clean it all up and set it up and then try to get our lading invoices and check to see what was going where. And we'd know how to start loading it, and anything that was busted or just broke open, or busted open there we had to clean up.

We'd just have to clean it up. We didn't any kind of gloves. We weren't given any gloves. We weren't given any kind of a mask.

Q: So this powder was laying in the car?
A: Yes, sir. In the floor of the car, and busted open.
Q: In a powder form?
A: Yeah.

Q: And you had to sweep it up?
A: We had to sweep it up.
Q: Did that cause some dust?
A: Oh, yes, sir.
Q: Dust you could see in the air?
A: Yes, sir.
Q: How long were you a car supply man?
A: Probably, I'm not for sure, but [17] probably on and off, probably, six, eight, maybe ten years. That's on and off, different times in the position, and out of the position and back in.
Q: Now, when you were doing this transferring these bags and these sheets, would you get white dust on you—on your clothing?
A: Yeah, you would. Yes, sir.
Q: Did you get it on your face?
A: Yes, sir.
Q: Did you ever get it in your throat?
A: Oh, yes, sir.
Q: Did you cough it up?
A: Yeah, you'd have to cough it up.
Q: How—you keep saying this was asbestos. How do you know it was asbestos?
A: Just the markings on the boxes. See, they'd come in different containers and different packages and different weights. There's many different types of asbestos.
Q: The markings on the containers, what kind of markings are you talking about, did it say asbestos?
A: It would say asbestos, yes.
[18] Q: Did anyone ever tell you to wet this asbestos down when you were sweeping it up?
A: No.
Q: Were there any other places on the railroad where you came in contact with asbestos?
A: Most mine that I can recall would be at the stationhouse, at the transfer yard.

Q: What's the stationhouse?
A: That's what we just talked about. This transfer station, where I was just telling you about we worked out. Most mine, of the powdered type and stuff like that it would come from there.
Q: Were there any other buildings you worked at?
A: Yeah, I worked in buildings that were completely enclosed with asbestos. Overhead and around the pipes were covered with the insulation to cover with asbestos.
Q: What kind of buildings are you talking about?
A: Well, little small offices. Say, I worked in one of them that was probably eight-by-ten, and it was just a small office. I was the crew [19] inspector at that time in that office, and the walls were asbestos; the ceiling was asbestos.

The washrooms in there, they had it all packed around with asbestos to keep the heat, and keep it from freezing during the wintertime.

Q: Now, did this asbestos in the walls, was it dusty on these walls; did it have stuff flake off?
A: Not that bad in the offices, but in the shower room and places where they had it wrapped, sometimes it got wet and fall.
Q: Are you talking about wrapping around pipes?
A: Yeah.
Q: Is that steam pipes?
A: Yeah.
Q: You have also said this was asbestos. How do you know this was asbestos?
A: Well, from the looks of what the other was—it had it wrote on it.
Q: Now this asbestos on the walls in this building that was enclosed, did anyone ever tell you it was asbestos?
[20] A: No. Huh -uh.

Q: I want to switch now to the sand that you say you were exposed to. You mentioned the trains would come by and blow sand. Could you explain that better to the jury?

A: Yes. What it was, each engine behind the wheels had a box, and before they'd go on duty this engine would take and load the box of sand; and what the sand was put in there for was to give the engine traction when it started to pull out, or when it started to shove.

Q: Let me interrupt you for a second, what was your job duty during this?

A: I was checker.

Q: What did that involve?

A: Getting numbers off the side of the cars. I'd stand within, probably, five to six feet, maybe four—between four and six feet from the tracks where the cars would go by me and as they was pulling into the tracks I'd have to get the list of numbers; just hold a pad up and list of numbers of each car that went by me.

When they'd shove a cut up and cut them off, I [21] got the numbers, and when you cut them off then you would stop—cut the cars off and he'd throw this sand down and stop, and then when he started to pull out again he'd put sand back—to get the traction to get back out of there and go get another cut of cars.

Q: Now before I go onto that sand, your job was to write down the numbers of the cars as they went by?

A: Yes, sir.

Q: And you were standing four to six feet away?

A: Yes, sir.

Q: Could you have moved away from the train? Why were you standing so close?

A: So I could get the numbers. I don't want to get too far away from that train or I won't get them numbers, and they go by you fast. You've got to be quick.

Q: Okay. So you say there was a box of sand on the locomotive?

A: On each one of them they have what they call a sandbox. They call it a sandbox.

Q: Where is this located?

[22] A: Next to the wheels. It's above the wheels but there's a pipe that comes down and goes right into the shoot where it'll get right in on the drivers.

Q: Where does this pipe come out?

A: Right down where the wheels are and hit on the rails. It goes right down just like you—like the wheel was here (indicating), and the pipe come right down, on the edge, it come right down and then it would hit right close to that rail where the sand would come out of that pipe when they'd release it; and hit right on that rail, so when the engine went backwards or forwards it would hit it to give it traction.

Q: So the sand was thrown down on the rails so the train could have traction when it was stopping and starting?

A: Yeah.

Q: So you have a sandbox on the back of the train so when the, I guess the engineer, conductor, whoever it is—

A: Well, the engineer mostly is the man who handles all that.

Q: And as he would—

A: He would work that. It was just some [23]—now, I don't know the exact control or how it was set up, but I do know that they had sand, they had sandboxes and they had to be filled and they were sitting behind each driver. I'm talking about the wheels, with lines going down to the rail where it'd come right, maybe this far from the rail. I'm saying, just off the rail behind the wheel so that when the sand—he released the lever up there, why it would shoot the sand out right down on that rail where the wheel could hit it.

Q: Now, did this sand—so as I understand, the sand comes out and gets thrown in front of the wheels to give the train traction?

A: Right.

Q: Now, this is only when it's stopping and starting?

A: Stopping and starting.

Q: Earlier you said that you were standing there and they were going by fast. Now, when would the sand come out as they were going by?

A: When they're going by, this sand—the only time you get the sand is when the train stops, like he's cutting the cars off, or when he's pulling out. [24] See, he may pull out there with a cut of, say, fifteen cars. And out of these fifteen cars he's going to shift them into several different tracks laid out in front of him, and what he does, when he pulls out there and starts cutting them off, he may cut two off here, then he'll pull back up and he'll get him another—

What he has to do is pull them out here and get back here and then give him a shove and then stop right quick.

Q: So, sometimes he would stop in front of you?

A: Yeah.

Q: And the sand would blow on you?

A: Yeah.

Q: Now, did he always stop in the same place?

A: No. A lot of times he was farther back and he would stop. In other words, just when he got close to the end, ready to pull up, he'd be right next to me.

Q: Did you know when he was going to stop?

A: No, I didn't know how many cars he would cut. I'd just start taking the numbers and when [25] he cut the car I quit the numbers and I got the last number.

Q: So, would it be fair to say that when he came along—this locomotive comes along, it might stop right in front of your [sic] or it might stop passed?

A: Yeah.

Q: So you never know—

A: Or it could stop back behind me just some.

Q: So when he stopped in front of you that's when you got the sand blown on you?

A: Right.

Q: So you never knew when you were going to get sand blown on you?

A: No. Huh-uh.

Q: Now, when this sand blew, is this a big cloud of dust or enough to get on you?

A: Well, it was enough to get on you. It would come out of there and hit and blow up in the dust, along with coal dust.

Q: Could you see this sand when it was a dust? Could you see it in the air?

A: Yeah.

[26] Q: And would it get on your clothes?

A: Yeah.

Q: Did it get on your face?

A: Yeah.

Q: Would you also breath that in?

A: Yeah, there's no way out of it.

Q: Did you cough that up?

A: Oh, yes, sir.

MR. PAULEY: Your Honor, I'm moving onto a different area now. I think it'd be a good place to stop and break for lunch.

THE COURT: Okay. Folks, we'll recess until 1:15.

(WHEREUPON, a recess was taken for lunch, after which the following proceedings were had.)

[27] AFTERNOON SESSION

WHEREUPON, after the recess was had, the proceedings continued in open court, to-wit:

THE COURT: Mr. Shirley, come back and take the stand, please, sir.

BY MR. PAULEY:

Q: Mr. Shirley, when we broke for lunch we were discussing your sand on the railroad?

A: Yes, sir.

Q: How that you, standing nearby the train when it passed, it blew sand on you. I'm going to ask one more question on that, when you—when the sand came out did that sand just go on the track or was it on the wheels and the brake system of the train?

A: To the best of my ability it was on the—it goes down on the rail and it points so that it goes right straight in the wheel and the rail. It hits both at the same time.

Q: Okay. Did it ever get blown up into the wheels of the train?

A: When they would take and yes, with the steam cars it did.

Q: Did that further make it dusty?

[28] A: Sure it would make it dusty, yes.

Q: So, as I understand it, your basic exposures to dust on the railroad included the asbestos that you were loading and unloading?

A: Yes, sir.

Q: Asbestos in a building—buildings you were in?

A: Yes, sir.

Q: Steam pipes?

A: Yes, sir.

Q: And the sand off these locomotives?

A: Yes, sir.

Q: Okay, and just to make it clear, the locomotives coming by have sand in the box, raise it on the rail—

MR. ADKINS: Your Honor, I'm going to object. That's not asking questions. I think he's deciding all the testimony we've already heard.

THE COURT: I'm going to permit a little bit of preface. I'll permit it, so long as he doesn't testify to it.

BY MR. PAULEY:

Q: So, if I understand this correctly, the [29] train goes by, sand gets thrown onto the track, kicks up, goes to the wheels, creates dust, gets on you, is that correct?

A: Yes, sir.

Q: And you breath that in?

A: Yes, sir.

Q: Would you say that your work on the railroad for twenty-nine years—would you say you worked in dusty conditions fairly often?

A: Yes, sir.

Q: Would you come home with dusty clothing?

A: Yes, sir.

Q: Did the railroad—anyone from the railroad ever tell you that asbestos was harmful to your health?

A: No, sir.

Q: Did anyone from the railroad ever tell you it would cause a disease?

A: No, sir.

Q: Did anyone from the railroad ever tell you that asbestos would cause cancer?

A: No, sir.

[30] Q: Did anyone from the railroad ever tell you that sand or silica would cause disease?

A: No, sir.

Q: Did anyone from the railroad ever tell you that sand was harmful to your health?

A: No, sir.

Q: Anyone from the railroad ever tell you that silica and sand may cause you cancer?

A: No, sir.

Q: Did anyone from the railroad ever tell you you should wet down dust?

A: No, sir.

Q: Did anyone from the railroad ever tell you you should wear respirators or dust masks or inhalers?

A: No, sir.

Q: No one ever did in those twenty-nine years?

A: No, sir.

Q: Did anyone ever—did you ever see anyone from the railroad, or anyone at all, taking air samples around areas you were working?

A: No, sir, not that I recall.

[31] Q: Mr. Shirley, when did you first determine that you had a dust disease? When was it first conveyed to you that you had a dust disease?

A: The best I can recall is when I was at Dr. Gaziano.

Q: Gaziano.

A: Gaziano, he told me that I was worse than I were before and that I had dust.

Q: Okay, worse than you were before. Was there a time before that you got diagnosed?

A: Yes, I had been x-rayed, previously.

Q: Do you know when that was?

A: No, sir. I don't. I don't—I just don't recall the date. It was back—I just don't recall the date of when it was. Probably, if I'd say I'd just be guessing. Probably, '91, '90, somewhere along that line.

Q: To the best you can remember it was around that '91, '90?

A: Yes.

Q: And you said that Dr. Gaziano had said you were worse than you were before?

A: Yes, sir.

[32] Q: Do you experience today what you believe to be unusual shortness of breath?

A: Yes, sir.

Q: And could you explain that to the jury?

A: Well, anytime, no matter what I do, I could just be talking and I'll run plum out of breath. I can't talk but just a period of time and I'll have to rest. But if I just like walk

from yonder over here, a lot of times—most of the time I'll have to stop and lean up against somewhere.

That's why I've got a cane, to lean and stop, just so I can get a little air. I cannot go up and down steps without taking a break half—just a few steps. I can't walk any long distance. I just don't have no air and I can't—well, I used to sing in the choir.

We used to sing at Church, but I don't have the wind. I can't hang onto the notes.

Q: Now, you say you can't do these things. You can do these things, it just makes it harder? Is that what you're saying?

A: Yes, sir. I just run out of air. I can start, but I can't finish them.

Q: You mentioned the walking, how far do [33] you think you can walk without getting short of breath?

A: Probably from here to the outside out there, maybe a little farther.

Q: Do you start getting short of breath?

A: It just depends. Yes, sir.

Q: Any other things around the house that cause you problems?

A: Well, I can't do my housework. I help my wife some when I can, but if I could set down I could push the sweeper a little bit, but I can't stand up. It just—I'm just wore plum out.

Q: So, you're saying that you have trouble doing household chores. Is that what you're saying?

A: Yes, I do.

Q: Now, you've talked about climbing steps and walking and so forth, and I think you mentioned you had a problem with your ankle. Has your ankle also hurt you in doing these things?

A: Well, my ankle is a lot of my walking problems, but now my breathing problem, that's different. Yes, I do

have pain. Arthritis is in my legs and in my knees and I do everything.

Q: Let's talk about something that [34] wouldn't involve your ankle injury, like you were talking about singing. Do you have problems singing?

A: Yes, sir. For thirteen years I traveled and sang with a group, and we sang, I guess, in twenty-five different states.

Q: What kind of group was this?

A: A gospel group.

Q: And you sang in different states?

A: We sang in North Carolina, South Carolina, Virginia, Tennessee, and we even sang in Canada. We traveled just on the weekends so we could be back in time for work. But we broke up in the mid '80's and I couldn't hold my notes, I couldn't sing no longer.

So, I got down to where now I can't even do a line of a song. I've got no wind. It quits on me.

Q: Do you go to Church?

A: Yes, I do.

Q: Do you sing there?

A: Just a part of a line and then I can pick up on a line and go, but I can't hold the notes. I can't sing long enough.

Q: I don't believe I touched on this earlier. Do you smoke?

[35] A: No, sir.

Q: Have you ever smoked?

A: Back when I was a kid I tried it but it wasn't for me.

Q: You tried it? Did you try it for four or five years?

A: Oh, Lord, no. I tried it and it made me drunk and shimmy headed and dizzy and I had to lay down. So, I mean, it just wasn't for me.

Q: So you never smoked?

A: No.

Q: Have you ever tried any other tobacco products?

A: No, sir.

Q. Ever chewed?

A: I tried chewing once, and a little bit of it went down my throat and I like to died over that, so I seen that wasn't for me either.

Q: What other kind of health problems—we've talked about the ankle and we've talked about the shortness of breath. What other kind of health problems do you have?

A: As far as I know, none.

[36] Q: Do you have any heart problems?

A: Well, yes, I'm sorry about that. I did—when my doctor diagnosed me as a heart condition. He said over the years that my valve, the main aortic valve had begun to close up and they sent me for surgery. I had surgery in 1995 in July and when I come back from surgery it was successful, and I had no problem whatsoever and I done good.

After a while I had better breath—better air, but then it gets worse on me again. It got back worse than it was then, the breathing, but I went down hill after a while. And I'm on medication. I'm on—I have to have one seven-and-a-half gram pill that I take a day to keep my blood thin, because the transplant that they put in me, it wasn't—it was the man-made one.

Q: When did you have this heart surgery?

A: In '95.

Q: Was that a successful surgery?

A: Yes, sir. It was.

Q: I guess it was, I see you today.

A: I done real well with it and he was real pleased, Dr. _____ was.

[37] Q: Even though that heart surgery was successful, did you have shortness of breath problems after the surgery?

A: Yes, I did. Yeah. I sure did.

Q: Was it any better after the surgery?

A: It was better after the surgery for a while but then it got back on me again. I started going back down hill with it.

Q: Compared to before your heart surgery, is your shortness of breath worse then, or today?

A: It's worse today.

Q: Is it getting better or worse?

A: No, it's getting worse.

Q: I want you to explain to the jury how this shortness of breath and this dust disease has affected you mentally?

A: It's really made a nervous wreck out of me. See, when Dr. Gaziano told me that I was worse than I was before, well, you know, nobody wants to die. We all want to live as long as we can. But I get to thinking about my family, my kids, and I'm just trying to make preparations and just have everything in order.

I don't know, but the only thing he tells me [38] is that it can't get better. It's going to get worse, and after all these years when you come down like this, you know, you get to missing a whole lot of things you can't do. I get depressed sometimes.

My wife, sort of talks to me, and that's because I get to thinkin' I'm gonna die with it, I don't know. But I've just got to keep going on. You can't do no more.

Q: Do you, Mr. Shirley, do you worry about cancer?

A: Yes, I do.

Q: Could you tell me a little bit about that?

A: Well, since all this come about here, and the way he talked to me and then I've got a brother-in-law that he's worse than I am. And his is in, I think, about the third or fourth stages, but I don't know how many stages you go through, but he's scared about it, too; and I think anybody, you know, that has anything that pertains or leads in that direction, you know, it really can destroy you inside.

You just figure, what's the use, you know. He can't do this and he can't do that. Why do you care? [39] Why do you go on, but you've got to go on because we can't stop. We've got

to keep fighting and keep going ahead, and that's the way I try to look, too.

Q: Are you more afraid of the shortness of breath or are you more afraid of the cancer?

A: I'm more afraid of the shortness of breath because I'm just closing out more and more every day. And I don't know just how I'm gonna go, you know, but I'm real worried about the shortness of breath, and I don't know of anything you can do about it. The only thing I know is pray, and God knows in heaven I try to do a lot of that.

Q: I just wanted to ask you one more question, when—about the sand on the railroad tracks?

A: Yes, sir.

Q: Did that sand get broke up?

A: How do you mean, into dust?

Q: Yes.

A: Well, when it was crushed it would get broke up. Yes, I'd say.

Q: Is that what caused most of the dust?

A: Yes, I'd say.

MR. PAULEY: I have nothing further.

[40] (WHEREUPON, direct examination was concluded as the testimony continued.)

TRIAL TRANSCRIPT
April 17, 1998

Johnson Testimony

* * * *

[3] (Witness sworn)

THEREUPON CAME,

DOYLE RAY JOHNSON

who having been duly sworn to tell the truth, testified as follows:

MR. BOITER: Good afternoon, Mr. Johnson. How are you?

MR. JOHNSON: Fine. Good afternoon.

MR. BOITER: I know you have some hearing difficulty so I'm gonna try to talk loud enough for you to hear. You made me promise to face you. You do a little lip reading to try to understand what people say?

MR. JOHNSON: Yes, sir.

MR. BOITER: If you don't understand what I say, you just let me know. I'll be glad to repeat it and I'll try to look at you and speak slowly while I talk to you.

DIRECT EXAMINATION

BY MR. BOITER:

Q Would you tell the jury your full name?
A Doyle Ray Johnson, Box 2584, Williamson, West Virginia.
Q How long have you lived down in [4] Williamson, West Virginia?
A At my present address?
Q Yes, sir.
A Twenty years. The past twenty years.

Q Where did you live before that time?
A Well, I lived in South Williamson, Kentucky, for approximately fourteen years, then about ten years in Sprig, West Virginia, ten years at Cedar, West Virginia.
Q Are you married?
A Yes, sir.
Q Is your wife here in the courtroom with you today?
A Yes, sir.
Q Is that her sitting back there in the back?
A Yeah.
Q Do the two of you have any children?
A Three.
Q And I've sort of been asking everybody: Do you all have any grandkids?
A I've got six.
Q Have you and your wife helped take care [5] of the grandkids?
A Well, since she retired, we baby-sit for them. You know, for one of them. And like when schools out, every evening when they get out, they come to our house cause every one of their mothers or daddys a' workin'. And they come by, you know, after they get off work at five o'clock, six, pick 'em up.
Q How long have you all been helping take care of the grandkids?
A Ever since they've been born.
Q How long is that?
A Well, one is twenty-two.
Q Do you have any great grandkids?
A No.
Q Is there any truth to the rumor that the reason you don't is because you told them you didn't want them to have kids because you were tired of baby-sitting?
A Yeah, I was tired of baby-sittin'.

Q I'm not sure if I asked you this, let me do it again, when I got started off. How old are you? I want the jury to know.

A Sixty.

[6] Q How far did you go in school?

A I went to the ninth—tenth grade.

Q You quit after the tenth grade?

A Yes.

Q Why did you quit after the tenth grade?

A I got a job on the railroad.

Q Went straight from school to the railroad?

A Yes, sir.

Q Did you ever serve in the military?

A No, sir.

Q Have you ever smoked?

A Yes, sir.

Q When did you start smoking?

A I was about eighteen when I started smoking.

Q About what year would that have been?

A About '55.

Q How long did you smoke?

A I smoked until about '68.

Q Did you smoke continuously during that period of time?

A No, I quit between '68 and '70 for about [7] two years. I quit smoking.

Q Did you pick smoking back up after that?

A I picked smoking back around about '70.

Q When did you finally quit smoking for good?

A In '87. November of '87.

Q How many packs of cigarettes a day did you smoke when you were smoking?

A I'd smoke a pack a day.

Q I want to talk to you a little bit about your railroad work history.

When did you first go to work for the railroad; what year was it?

A October 1952; 2nd of October.

Q Where did you go to work for the railroad?

A At (inaudible), West Virginia.

Q Do you remember what you hired in doing?

A I hired in on an extra force. I was the water boy.

Q What did a water boy do on the extra force?

A Oh, take care of the water barrels, you [8] know, keep ice in them, fresh water. A gang had, I think a gang had about thirty some men.

Q What did that gang do? What kind of work?

A They laid mine tracks, laid the track in the yard, they dressed ballast by hand. Back then, by hand manually, you know.

Q Did you—were you doing anything else at the period of time that you were also on the extra gang?

A No, I went from the extra gang to the section gang on the following spring. Along about April when they put all the men back to work. Cause it was a higher paid job. I transferred from the extra gang to the section gang.

Q How long did you work the extra gang; from 1952 to when?

A Fifty-three.

Q And when you were in the section gang, how long did you work in the section gang?

A I worked the section gang from about '53 to about '55.

Q What type of work did you do in the [9] section gang?

A Well, we put in broke rails, installed ties, and labored, generally, to refine our track area in the yards.

Q During the period of time from '52 to '55 when you were working those gangs, do you recall ever doing anything that would have exposed you to asbestos?

A Yes, sir.

Q Would you tell us what those are?

A Well, we'd have to go in the roundhouse. You know, if we had broke rail we'd have to go in the roundhouse and they'd give us a stall, that whatever that rail was broke, to put it in. And you had to get it out of concrete. It was a pretty hard job. You're talking about, maybe, six, eight hours a day just to get one broke rail. That's where I come in contact with my first asbestos, was in the roundhouse.

Q Okay. What were they doing in the roundhouse while you were doing your work?

A They was tearing down each of the 2100's, the jackets off the side of them and the front of them.

Q What's a 2100?

A That's a engine.

[10] Q Steam locomotive?

A It's the biggest one.

Q Was a 2100 as big as this one? (photograph)

A Bigger.

Q Is this representative of what you saw go on while you were in the roundhouse?

A Yes, sir. And sometimes they would just take the front off. You know, they've got the rings on the front of the engine. You had your headlights and you had your number right on the middle of that ring. Well, they'd take all `them bolts out around that ring, pull that ring off, and you could see back in there to what you was gettin' into to start with.

Q Any other exposure—let me back up a second. What type of—did you actually see folks removing asbestos off of these steam locomotives when you were doing that work in the roundhouse?

A Yes, sir.

Q Were you in there at times when you saw people applying asbestos to the steam locomotives?

A Yes, sir.

Q About how often would you have actually [11] been working in the roundhouse during that period of time?

A Maybe you'd go in one day a week, or some days they had two broke rails, you'd have to go in two days. Then you might go for a week or two and you wouldn't go at all.

Q Would you explain to the jury how a roundhouse is set-up; how you get an engine in and how the whole system sort of works?

A Well, can I get up on the wall here and show 'em?

Q How about I bring a chart around and let you—

A Yeah. Bring me one.

Q I take it you're an artist?

A Yeah. Good, too.

(Indicating) Now, this all over in here was all your yard tracks. They go straight through. And this right here was a turntable, and you had seventeen stalls in this roundhouse. Now, the roundhouse at Williamson, it didn't go all the way around. It just went from this point right here to this point right here.

[12] And they could take and bring an engine in on one of these tracks right here and put it on this turntable and they had an operator in there, in this little box over here, and he could run a engine around anyway they wanted it; and, you know, put it on any of them seventeen stalls. And that's the way they done it when I was there at Williamson.

And this lead track over here, this right here, as I say, it was on a turntable that would go around. And they could operate on all seventeen tracks. And this one track right here went all the way around back behind the storehouse where they could get boxcar supplies back there.

Q So this was actually a turntable, but the whole thing was just sort of set up in the round so they could just slide locomotives in the stall?

A That's right.

Q If you were working, you had to come in and do repair work, say, on this track, could there be other locomotives in these other tracks where you were working?

A Oh, yeah. Say, maybe, they wouldn't be working number eight, they'd give you number eight. [13] Well, there would be a train over here in seven and there would be one over here in nine. They'd have one, maybe, in eleven, and one in ten and twelve.

Q During the period of time from 1952 to 1954, were there any other places that you worked where you had been exposed to asbestos?

A Yes, sir. In the yard; in the Williamson yard.

Q Would you tell us how you would have been exposed in Williamson yard?

A They had switch heaters. They was about two foot long and about four inches wide.

Q What did you use a switch heater for?

A To melt the snow on the switches, you know, when it would come a snow.

Q Okay.

A And they would put kerosene in the switch heater and they had like a valve on the end of it and they'd take that asbestos back in that valve. They had a little lid that went over top of it and you push—open the lid up, set it on the switch and you'd light it. Well, it burned real high, maybe that high to start with and you would push that lid back, cut the flame [14] down until you got it where you'd want it. Cause they wanted it to come up about halfway to the bottom of the rail. You'd just have to go back in there, maybe, as long as two or three days, nights, and you'd have to go back and fill it up with kerosene.

Q Did you ever have to remove the asbestos out of those heaters?

A Yes, sir. They'd take them in—most of the time they'd do that in the fall—like they'd pull them out of there in the summer cause we'd be doing the work on the track. Well,

along about October, they'd take all that packing out of that switch heater, and put new packing in it, and take metal reserve and patch the metal. Then they'd stack all behind the coolhouse, ready for the first snow.

Q Was the packing that you took out of there, was it clean, was it dirty?

A It was dirty.

Q Did it generate any dust when you took it out?

A Most of the time it was wet, you know, damp.

Q In the fall it would be damp when you [15] took them out?

A Yes.

Q Okay. During the period '52 to '54, were you exposed to any other dust besides asbestos in the places where you worked?

A In the yard?

Q Yes, sir.

A Was I exposed—repeat that again.

Q The '52 to '54 time period, we've talked about asbestos. Were there any other dusts that you were exposed to in any of the work that you did?

A Yes, sir, the coal dust in the yard and the sand from the engines.

Q How were you exposed to the coal dust?

A Well, the wind blowing. You know, it was dusty in that yard.

Q Where was the coal dust out in the yard?

A It was everywhere in the yard.

Q Was it in cars, or was it just out in the yard?

A It was on cars, you know they had cars stored there, and it was loose on the ground where they'd be a switchin' cars, knocking it off cars and [16] things out in the yard.

Q Did you go on to do something different at the railroad in 1955?

A I started helping a welder.

Q How long were you a welder helper?

A From '55 to about '58.

Q Tell us what a welder helper is and what you did as a welder helper?

A My job was—the welder would build a rail end up and he had a flatter that he put on the rail while it was hot, and I'd take a—

Q I'm gonna stop you. Explain to us what you're talking about so we understand, us non-railroad people understand what—describe what you're talking about as you do that.

A Okay. Every joint where two rails come together, the wheel will beat and knock that joint down. So the welder, he comes by, we do, and welds a strip of metal across it. And he takes a flatter and holds that flatter on there and shapes and contours the rail up. And I get the flatter ready.

Q Was that your primary job responsibility during that two year period?

[17] A Yes, sir. And, plus, we had more work to do. Like they call them driver burns. It's where a engine wheel will slip out in the middle of the rail. Well, you've got to go back there and take and put bars on it because you can't heat that rail. If you do, and a train comes, you've lost your rail. It would mash it.

Q Let me stop you for a second. What were you doing while you were heating the rails up when there was an engine—had a wheel burn?

A See where that engine burned, the metal would be fractured. You would grind that out and build that back up with your metal, and then grind it down.

But you had to put bars on it. We put, they said, regular angle bars. You put two angle bars on it. You dig out under the rail and run a clamp through all the bottom of the bar and tighten it up with a big ratchet.

When you was a weldin' that rail, if a train come, it wouldn't hurt it. It would mash it a little, you know, but I mean, it wouldn't damage it.

And they had a roll of asbestos that they'd roll off and cover that plank with. Because if you let that hot metal, you know, you let a spark or [18] stuff get down in that clamp, you won't get the clamp back off.

Q I'll ask you, if you don't mind to come down and draw us—let me make sure the jury understands what you're—can you just sort of demonstrate?

A Oh, yeah. I can do that. Now I'm gonna draw the rail facing in. (Illustrating) Now this here is the top of the rail where the wheel runs off of the engine. This is engine burn—when a wheel slips on an engine it'll jerk a piece of metal out, maybe shaped like that. It'll be flat down, maybe a half inch. We take and grind this out, this fractured metal, grind it down where it's clean metal, nothin' fractured.

Then we put a pair of angle bars on it. An angle bar is a thing that holds two rails together, joins them. It's got six bolts in it. Well, you can't drill a hole in a regular rail, in the middle of a rail, so the company had a clamp that they would dig out more of this crib, here, and put that clamping on that. They had a C-clamp and they'd tighten that up to pull that bar in. Because when we started workin' out there and buildin' that rail, if you got that real hot, and a [19] train come along it wouldn't hurt it, but if you didn't have that bar on there, you'd mash that rail, and maybe, wreck the train.

Now, this clamp now, mind you, had threads on it. It would be like this here. (Indicating) Well, they'd take a roll of asbestos they had and they'd cover it up like that right there; and put a piece over on this side. Then we'd go ahead and do it all the way over in there, and when we got done welding, we'd pull that off and put it in the tool box.

Q Sir, you pointed down here and said something about a crib. Explain to the jury what that term means.

A A crib, well. (Illustrating) This is two rails right here, this is a tie, and right here is another tie. This is a crib tight

here, the dirt and rock that's right here between them two ties. You got another tie over here, you've got a crib there, you got another tie, you got a crib. That's what the company calls a crib. That's from this rail to that rail; the dirt and rock there.

Q Would the asbestos that you used to lay across there, would it get dusty dirty?

[20] A Yes. You could use the same piece, maybe, a week or two.

Q Would you actually get dust on your hands or your clothes, or anything like that when you used it?

A Yes, you would.

Q Do you recall any other types of asbestos that you used during that period of time when you were a welder helper?

A Would you repeat that again?

Q Do you recall any other uses, anything else you used asbestos for during that two year period when you were a welder helper?

A No, sir.

Q Do you recall during that two year period of time whether you were exposed to any coal or silica?

A Yes, sir. Cause we'd be workin' in the yard. Most of the coal dust, you understand, you're gonna run into it in the yard.

Q After you left the position of welder helper in '57, what was the next position you held?

A I went to work on the bulldozer and endloader at the coal pier, Pier 5, Norfolk, Virginia.

Q Would you tell the jury what you did as a [21] bulldozer operator on the coal pier in Norfolk? Would that have been about 1958?

A '58. The first part of '58.

Q Tell the jury what you did there.

A They had—the coal pier in Norfolk was where the company dumps their coal in the pier cars and they take 'em out on a elevator and take 'em up over top of the boats. And

they run out over top of the boats. The boats come in and they dump coal on top of that elevator. Right where they dump it it goes down through a bin into the boat. Then that pier car goes on out, goes through a switch, and comes back down a ramp. It comes down a ramp built back there and comes back in on the pier.

Well, they've got this dumper there. When it dumps the coal in a pier car, it picks the whole car up, turns it up and pours it out. When they set it back down, what coal they waste, I'd have to whenever one went out, I'd go in there with an endloader and pick that loose coal up. The way I done it, I'd just push it in a corner, maybe three or four bucket loads. Then I'd pick it up out of the corner and take it out and they had a conveyor, and I'd dump that on a conveyor and run [22] it back up in a car. And when they got the car full, they'd dump it back in the—

Q Was your work at the coal pier, was it still an N & W job?

A Yes, sir.

Q You were still working for the railroad during this period of time?

A Yes.

Q Do you believe you were exposed to any coal dust while you were working that job?

A Yes, sir, you couldn't see me in the evening when I got off work.

Q What do you mean by that?

A For the dust. You could see my eyes and maybe around my mouth a little bit.

Q I see.

A Cause see, when you was out there on the Chesapeake Bay, when you dump that coal on that conveyor, there would be that dust come up back in your face.

Q If you were working out on the coal piers, using the loader to pick it up, how long would you have to work picking up coal to fill an entire car [23] of coal?

A You could usually run—I'd say, maybe, from five to eight days that you'd have a loaded car; a hundred ton hopper.

Q And so, basically, every five days you'd pick up a hundred tons of coal?

A Yes, sir. Every five to eight days.

Q Is that pretty much what you did all day, everyday during that period of time?

A When I was on the loader that's all I done.

Q Now, how long did you work this job down in the coal pier?

A I was there. I'd say, for a period of about eight months.

Q After you left the coal pier, what did you do next? Are we still at 1958?

A Yes, sir.

Q Okay. What did you do next?

A I come back to Williamson yard and that was about the period of time that the company was making the change bringing the shop from East Williamson, down puttin' it in the roundhouse. You have to understand, [24] after we went to diesel, the roundhouses stood vacant. Well, shop track was up in the East yard, so they moved it from the East yard down and put all their entire work in the roundhouse.

Q So they just changed locations?

A That's right.

Q Starting in 1958, what types of work did you do at the railroad?

A From '58?

Q Uh-huh.

A I run a backhoe for a proctor gang. And their duties was just to take care of the maintenance work on the

roundhouse in Williamson, and bridges, and stuff like that, you know. That's all they worked on was buildings.

Q Anything else—I'm trying to find a convienient time for us to talk about—after you did that, what did you do next?

A Well, I stayed on that up to about '65, I'd say.

Q So, let's talk about '58 to '65 then. Describe in a little more detail the types of work you did from '58 to '65 and what it involved?

[25] A Well, it involved—they was making these changes at the roundhouse. They tore out all the tracks that went through the roundhouse and remodeled it, and they took up all the floor.

Q How were they doing this?

A Well, I did it with a backhoe. The floor now, was a four by ten creosote board and when they laid them, I think it was in '23 when the roundhouse was built, they sawed them off like a four inch brick; and they had concrete that went around the walls and where you went out the doors. But in between the tracks, they had that wood. And I asked why they had that for and they said it was easier for the men to stand on all day. Well, when they remodeled the shop, they dug all that up, and when they put it back down they put concrete.

We put four sets of hydraulic jacks in, took the pits out of four tracks and put four sets of hydraulic jacks in.

Q Okay. How long a period of time were you involved doing that kind of work at the roundhouse?

A Up till about '68. We stayed there in that roundhouse, you know, remodeling.

Q Were you exposed to any asbestos [26] containing products during that period of time when you were doing the remodeling?

A Yes, sir.

Q Tell us how.

A It was in that floor, that wood. Cause see, we had to take a backhoe and dig 'em up, and loaded 'em in a dump

truck; and took 'em to a clean-out track. See, Williamson had a clean-out track. They had a clean-out track for the whole railroad. They sent everything to Williamson and throwed it over the river bank.

Q What kind of asbestos was in the floor?

A I would assume it was from the engines and a lot of it was from these pipes where--there's a steam line through there. See they pulled all of that out of there in '65 to '68, when they remodeled.

Q What did you do next, after '68 when you got done with all this, what type of job did you go to next?

A From '68, I went to a tie production gang and ballast gang. I run a tie crane, I run tie saws, I run sky fire, I run tie hammer, ballast regulator, tampers, electric tampers, whatever piece of equipment [27] they had on one of them gangs, I was qualified.

Q What is a ballast regulator?

A A ballast regulator is a machine—it's got boxes built on the side of it. Everything is hydraulic controlled. Like if they dump the ballast and they service the track, they take a ballast regulator—

Q I'm gonna stop you just a second. What is ballast?

A It's rock.

Q Okay. Go ahead. I'm sorry.

A They have a plow in front of it and you can split the plow. Like if you want to put rock over on one side, you can, or if you want to put it over on the high side.

Q I need you to be an artist for me again.

A All right.

Q So we all understand what we're talking about. Think you can draw this one?

A Yeah. What are we gonna draw?

Q Explain the ballast regulator and how it works in relation to the tracks—what you were doing.

A Okay.

THE COURT: Ballast is just the rock [28] between the ties that the track sits on.

THE WITNESS: About like that, but they call is [sic] ballast.

THE COURT: Right.

THE WITNESS: These little marks right here (illustrating) cross-ties. When they service—first they dump this ballast on this track. They come through here and dump it plum to the bottom of the rail. It's about eight inches of ballast, and they raise this track up. They got a tamper that comes through here and they just tamp each tie, that rock under each tie. Then after he leaves here they got a machine that'll come through and line it. It's got a kink—you line that track back that-a-way and that-a-way.

Well, when they get ready to dress it, they got a ballast regulator that'll come through here. He's got a plow on the front of it, like this right here, and they let that plow down and they can just push that rock right off the track over this way or that way. If they want to put it all over on this side, they can split this wing, take a flat shoot right here and one right here, and they can bring this wing and make it come just like that. They can throw every bit of that [29] rock back along the low side. If they wanted to reverse it, they could do it this other way and bring it back to the high side.

They got two boxes that comes out on a machine and they make something like this right here. We laid this down, and he hooks them in again the track. That's what shapes the berm, makes a roll on the track. You go through there with them and it makes a roll.

Now, on the back end, what rock is left, you know this plow won't get it all out, they got a big broom that's got knobs on it like that. They are a rubber air hose is what they are. They'll turn that broom on and back up with that machine

and they'll sweep that tie. Sweep every bit of that rock off. That's the machine that'll give you your dust.

Q When this machine was in use, would the rock actually get pushed around and crushed up?

A No. It just whipped up the dust, you know. It wouldn't mash the rock or nothin', you know, it would just push it off of the track.

Q During this period of time was there a job that you worked on where the railroad rented a machine from the Speno Company?

[30] A That's in the year—'73 was the first year I worked on the Speno.

Q Would you spell it for us?

A Speno? S-P-E-N-O.

Q Okay. What type of machine was that that you used?

A It was a ballast cleaner.

Q Explain to us—you talked about a ballast regulator, explain to us what a ballast cleaner is.

A Do you want me to come over there?

Q Well, you can probably tell us. Tell us and we'll see if Mr. Rion understands—

A A ballast cleaner, a Speno ballast cleaner, it had a scoop on each side of the machine and it would go about two foot down over the tracks and it had a eighteen inch belt on it; and they pulled it with a diesel engine. And when they'd start pulling it, that scoop, the rock would come up through that scoop, and go through the conveyor and take it to the top of the machine. Well on the top of that machine they had big shakers and they was a vibratin', had vibrators on 'em. And when that rock hit over in that vibrator, the dirt [31] went down in what you call a hopper. Well the rock would slide off in a baffle box, they called it. It was just a big box in a machine that held rock.

Well, they's pulling you along so you had two operators on the front picking it up, and it'd go over in that hopper shaker,

and the dirt that went down along there, you had a short belt that would throw it over the bank. Well, now you had two operators sittin' behind that short belt, and they'd regulate that ballast back down in that hole where you just picked it up out of. And they had one man on the top that run the boom. He controlled all the booms there.

Q I'm not gonna try to be an artist. I'm gonna draw two lines. Were you talking about picking it up on the outside of the tracks? Is that what we're talking about?

A Yes, sir, right at the head of the ties.

Q You pick it up here (indicating), it goes in the machine, and it comes back down behind it?

A Yes, sir. You could average about eight mile a day if you had no breakdowns or no train delays.

Q How long a period of time did you work on the Speno machine?

[32] A From '73, to the last year I believe I can remember workin' on that was in '84. That was the year we had the floods in Williamson and they sent two over there to clean that track that had just flooded from Williamson to Bluefield. I'm gonna say eleven years. And the time that I would work on it would be like—it was a seasonal job. It would come out about the first of April and they'd work it up till November if it didn't rain, or no freezy or no rainy weather.

Q How did this process, or did this process generate any dust?

A Yes, it did.

Q How was dust generated from this process?

A In the shaker and all of the belts a turnin' and a carryin' that coal dust. It was just like a coal tipple.

Q Like a coal what?

A Tipple.

Q What's a coal tipple?

A That's where you run coal through the tipple and crush it; process it.

Q Explain that one. How does a tipple process it?

[33] A Well, it takes coal, see raw coal—

MR. ADKINS: Your Honor, I fail to see—you know, I don't think we're—I fail to see—I mean, it's interesting, but I fail to see how it's relevant—coal tipples—they're talking about a Speno machine.

MR. BOITER: He said that's what the machine did.

MR. ADKINS: Well, I understand that, but they're not running coal through it.

MR. RION: They're running rock through it.

THE COURT: Go ahead.

BY MR. BOITER:

Q The rock got crushed up is what you're telling us?

A No. What I'm telling you is you—that machine put out as much dust as a tipple did when they was processin' coal through it; raw coal.

Q Did the railroad ever provide you with any respirators for this job?

A The railroad?

Q Yes, sir.

A No.

[34] Q Did somebody else give you a respirator on this job?

MR. ADKINS: Now, Your Honor, unless they have something to show—I'm not sure what we're getting into here. But unless they have some evidence, or something, or qualify him to answer this question, I'm going to object to it.

We'd like to approach, if we could.

(Whereupon, a discussion was held out of the hearing of the jury)

MR. BOITER: He said in his deposition the Speno Company, which they rented this machine from, provided them with a respirator.

MR. ADKINS: A laborer or machine operator doesn't know whether a machine is leased, he doesn't know who Speno is, there is a mask in there, he doesn't know where the mask came from. I think this is highly prejudiced.

THE COURT: Why do you say that?

MR. BOITER: He said he does.

MR. ADKINS: They have not qualified him to do that other than somebody told him to do that. It's [35] hearsay anyway. There is no way this should come in. I mean it's very prejudicial, Judge. He's not qualified to give the answer, he's got to have personal knowledge.

MR. BOITER: He says—his testimony is the Speno Company provided him—they came with a pack of respirators that were used up in about a month.

MR. ADKINS: But he doesn't know where those came from.

THE COURT: How does he know where they came from?

MR. ADKINS: He doesn't.

MR. BOITER: Just his own personal knowledge.

THE COURT: The supervisor, the Speno man sent a supervisor out with the machine—

MR. ADKINS: It's hearsay, Judge.

THE COURT: I think he can testify that they had respirators from some source for a period of time, otherwise if the company representative—

MR. ADKINS: It's hearsay, Judge. They'll have to lay a foundation.

THE COURT: Well, he can identify who the guy was. This was the guy from the railroad company—

[36] MR. ADKINS: I think this is highly prejudicial, there is not a proper foundation, there is no reason for them to interject this into this trial. It doesn't establish anything.

THE COURT: Yes, it does. It establishes—

MR. ADKINS: Sure, but the company would say that it provided operators nothing about lease agreements.

THE COURT: We'll just ask him what he knows. We'll take a five minute recess, folks.

(Jury excused)

(Whereupon, the following took place out of the presence of the jury)

BY MR. BOITER:

Q When the railroad rented the Speno machine—

MR. ADKINS: Judge, wait a minute, now. He's leading. Just ask him what he knows.

BY MR. BOITER:

Q Did the railroad own the Speno machine?
A No, sir.
[37] Q Where did the Speno machine come from?
A Syracuse, New York.
Q Did anybody from Syracuse, New York, come with the machine when it came?
A A superintendent.

MR. ADKINS: Okay. Was that a Speno superintendent, or a railway superintendent?

THE WITNESS: A Speno superintendent.

MR. BOITER: When the machine and the superintendent came, would you have been around when the machine arrived there?

THE WITNESS: Sometimes—No, no. The company usually had the machine sent to a location and it would be advertised, and we'd begin and we'd go to it—like if it came in on Sunday night and we's gonna go to work on Monday mornin', we'd report to it on Sunday night. It might a come in and be sittin' there for a week, you know.

MR. BOITER: When the machine arrived in the spring, were there respirators with the machine, masks?

THE WITNESS: Most of the time there was. Not a respirator, now. There's a difference between a [38] respirator and a spray mask.

MR. BOITER: Just a spray mask?

THE WITNESS: Yeah.

MR. BOITER: Do you know who provided those spray masks?

THE WITNESS: The Speno Company.

MR. BOITER: How do you know that?

THE WITNESS: Cause they was in their tool car, locked up in their tool box.

MR. BOITER: That came with the machine?

THE WITNESS: With the machine. Band aids, dust masks, Mercurochrome. It was like a little first-aid kit.

MR. BOITER: How long were those dust masks available when the machine got there in the spring?

THE WITNESS: You mean, how long would a box of them last?

MR. BOITER: Yes, sir.

THE WITNESS: Maybe, five or six weeks.

MR: BOITER: When those respirators were used up, or those masks were used up, were there anymore for the rest of that season using the machines?

THE WITNESS: No, sir. You couldn't get [39] 'em to get 'em.

MR. BOITER: Is it from your own knowledge that you know the respirators were provided by Speno?

THE WITNESS: Yes, sir.

MR. ADKINS: How do you know that, sir?

THE WITNESS: Cause it was in a locked boxcar.

MR. ADKINS: Who put those masks in the box? Did you see anybody put them in there?

THE WITNESS: No, I didn't see anybody put 'em in there. There was twenty of them.

MR. ADKINS: I understand.

THE WITNESS: They had Speno written on them; Speno 1, 2, 3--

MR. ADKINS: And the name of the machine was Speno. What were the name of the other machines you had out there? Did they have names like International Harvester, or whatever?

THE WITNESS: No. The only ballast cleaner that the N & W had was Frank Speno's ballast cleaner.

MR. ADKINS: Okay. So all the machines out there were Speno machines?

THE WITNESS: What do you mean, all the [40] machines?

MR. ADKINS: What I'm saying is, Speno is a brand name of a machine, right? Of a type of a machine.

THE WITNESS: Yes, sir.

MR. ADKINS: Right. And you don't know who owned that machine?

THE WITNESS: Yes.

MR. ADKINS: Did you see the purchase agreement?

THE WITNESS: No. Of the machine?

MR. ADKINS: Yeah.

THE WITNESS: They said, Frank Speno.

MR. ADKINS: I understand they said that, but do you know that of your personal knowledge?

THE WITNESS: No, sir.

MR. ADKINS: Somebody told you that?

THE WITNESS: Yeah.

MR. ADKINS: Do you know of your own personal knowledge who put the masks in the toolbox?

THE WITNESS: The Speno supervisor said that they put them in the shop in Syracuse, New York.

MR. ADKINS: But you don't know who owned the machine, whether the railroad owned it, or whether [41]—

THE WITNESS: Frank Speno owned it.

MR. ADKINS: Well, that's what they told you. Did you see a document or a lease or anything like that?

THE WITNESS: Yeah, when I was foreman, I had to sign one every night.

THE ADKINS: Oh, you signed a form for the machine that went with working out there, right? How many hours it worked, etc?

THE WITNESS: Yes, sir.

MR. ADKINS: But you don't know who owned the machine? You didn't see a title to it or anything like that?

THE WITNESS: It was on the form; Frank Speno Ballast Cleaner, Syracuse, New York. They sold it in '79 to Union Tank Car.

MR. ADKINS: Well, again, Judge, I think this is—I think we're getting into something here. We've established that of his own personal knowledge, he really doesn't know, and I think this is something that is prejudicial; and on this kind of foundation I don't think this should come in.

[42] THE COURT: How many ounces in a quart?

MR. ADKINS: I don't know, Judge.

THE COURT: You don't?

MR. RION: I know. There's thirty-two.

THE COURT: How did you find that out? Somebody told you. I mean, how we learn things in our lifetime is because we're told.

Who told you it was Frank Speno's machine, or that it belonged to the Speno Company?

THE WITNESS: All the superintendents—Every year there might be a different one and he'd stay with you for maybe two or three months, and there'd be another one come, but there was always, they called them Speno superintendents. And they said they was two Speno boys, Frank Speno and Martin Speno owned the company.

MR. RION: Did railroad people tell you it was a Speno?

THE WITNESS: Yeah.

MR. RION: Did your boss man tell you it was a Speno?

THE WITNESS: Yeah. It was all over the side of the machine, S-P-E-N-O, Syracuse, New York.

MR. RION: It's also like if a worker sees [43] Kaylo on the side of a box, of his own personal knowledge, he doesn't know that it came from the Owens-Corning facility, it's a circumstantial—

THE COURT: I'm gonna let him testify. Let's take just two or three minutes ourselves, and we'll bring the jury back in here.

(Whereupon, a brief recess was taken)

BY MR. BOITER:

Q Before we took a break, Mr. Johnson, we were talking about the Speno machine. Would you describe the mask that came with the machine; what it looked like?

A (Indicating) It was a piece of paper that was like that. It had a piece of metal, of aluminum that went across it like a straight bar right through here. It had a rubber band hooked on this side. A rubber band went out of this side. You put that up over your nose like that and mash that metal till it contours with your nose, and pull that rubber band down over the back of your neck. This part here come down over your chin and it was sort of contoured like your chin. But that is about as much protection as you had.

[44] Q Who provided those masks with the Speno machine when they got there in the spring?

A They come with the machine.

Q How do you know they came with the machine?

A Because we had to go get 'em out of the boxes in the boxcar. See the Speno Company brought a boxcar with them and they had every piece that went on that machine in that boxcar so if you broke down, you didn't have to go nowhere, you'd just go to that boxcar and get what you need. They put band aids, Mercurochrome, I call 'em dust masks in one box, and you'd have different parts in another one.

Q Why did you use that mask when you were using the Speno machine?

A Well, it would keep a lot of that dust from, you know, gettin'—it didn't keep it all, but it would help you a lot up until it got dirty.

Q When you operated the Speno machine, how long did it take for one of those masks to get dirty?

A On a real dry day, two hours. In two hours it would look like a black rag.

Q Okay. When the Speno machine came in the [45] spring, how long did the respirators that came, or the masks that came from the Speno Company last during that work season?

A I'd say a box of them, maybe, sometime they'd go maybe five or six weeks. You could use—they'd maybe be, see, about two hundred in a box.

Q As to that period of time, were there anymore Speno masks to use?

A No. You couldn't get 'em, they wouldn't send 'em.

Q Did the railroad supply you with a mask after the ones that came with the machine ran out?

A No, sir.

Q Did you try to get them?

A No, sir.

Q Was it still the same job after the masks ran out?

A I don't understand your question, now.

Q Were you still doing the same type of work after the masks ran out?

A Yes, sir.

Q Was it still as dirty after the masks ran out?

[46] A Yes, sir.

Q Would you have been breathing the dust during the period of time you were working that job?

A Yes, sir.

Q Just so the jury is clear, seasonally, about how many months did you work that job?

A Usually, they put it on around the first of April, and they'd work it till maybe November, if they had a real dry

October, you know, come up into November. They'd go up until the fifteenth of November, if it stayed dry. But if it would rain two or three days, you couldn't run it if it was rainin'. If it got down wet two or three days, they'd cut it off; send it back to the shop.

Q When you were doing this work, how many days a week were you actually working on the machine?

A It all depended on the railroad. I have worked it thirty-nine days in a row, seven days a week. It was several weeks before they'd let us go home.

Q When you were working that period of time on that schedule, at any point in time after the masks from Speno were gone, did the railroad ever provide you with a mask?

[47] A No, sir.

Q And how many years did you work this machine?

A My first summer was in '73, and I think I worked it till—the last summer was in '84, the flood. I'm not sure if it come back to the N & W after that, but I believe that was the last time I was on it, in '84.

Q So from '73 to '84 you never got a mask from the railroad to use on that job?

A No, sir.

Q For the other part of the year, during that period of time, what types of jobs did you do?

A I'd go back to runnin' the backhoe, maybe run a bulldozer, be on a servicing gang, or go back to my proctor gang. I've also run a clamshell.

Q You did that up till 1978?

A The Speno up to '84.

Q '84. Okay. In 1978, did part of you job responsibilities change then?

A Yes, sir.

Q What did you start doing in 1978?

A What now?

[48] Q In addition to the Speno, what did you start doing in '78?

A Burrow crane operator.

Q Explain that word.

A A burrow crane is a machine that pounds rails, they change rails in and out with them, and they are heavy liftin', and haul the material. It has a bucket on it. You can ditch with it, ditch mud with it.

Q How long did you do crane operator work?

A I worked on a crane from say in '78 to '87. I worked on the cranes, the clam shell, the burrow crane, and a backhoe. That's about it. You know, maybe I'd work three months and go back two months on one, you know back and forth.

Q During the period of time that you were a crane operator, do you believe that you were ever exposed to any asbestos dust?

A Yes, sir.

Q Tell us how you have been exposed in doing your work as a crane operator.

A Through the asbestos bands on the crane. They were made out of asbestos.

Q What do you mean by the band on a crane?

[49] A Well, you see, on a crane you got maybe twenty bands or more and they set right beside the operator—a big drum does all your turnin'. You got a loadin' band, you got a holdin' band, you got a swing brake, you got a swing band.

Anything that that crane does once, you got to have two bands for it, to stop it, see. One to make it move and one to stop. So when it comes to the travel part of it you've got four bands on the travel, cause you go forward one way, and back and reverse the other way. You've got two travel on it.

Q Now, how were you exposed to asbestos from these bands?

A Well, the bands would get hot and burn up on the machine, and we was sittin' up in there runnin' it. Red hot.

Q You were sitting directly in the vicinity of where the bands were?

A Well, I was about within three foot of them. But there was a partition, now, that went through the crane, a metal partition. But the band was in that room.

Q Was any other asbestos on the cranes that [50] you used?

A None that I can think of.

Q How long did you work the crane operators job?

A From '78 till '87.

Q And was '87 when you retired?

A Yes, sir.

Q Why did you retire?

A I had a leg injury in November of '87.

Q You hurt your leg and retired in '87?

A Yes, sir.

Q Besides the leg injury, we're gonna talk about the asbestos problems in a minute, what other types of medical problems do you have?

A Now?

Q Yes, sir.

A Do you mean that one over here—what I went through over the last twelve, fourteen years?

Q We're gonna talk about the asbestos in a minute and we've talked about your hurting your leg at work. Do you have any other medical problems? You've got your hearing problem.

A I have my hearing problem and I've had [51] cancer surgery five times in the last fourteen years.

Q What type of cancer surgeries have you had?

A Well, I had a melanoma took off my back. I had skin cancer took out between my eyes, and I had skin cancer took off my neck twice, and I've had it took of my arm once.

Q We're gonna talk a minute about the asbestos exposure. Do you know whether or not the doctors have said you have a lung disease from your exposure to the asbestos?

A Yes, sir.

Q Have you actually ever seen the breathing test or the x-ray results yourself, personally?

A No, sir.

Q Okay. But the doctors have let you know, though, that you do have an asbestos disease?

A Yes, sir. Asbestos and what's that other word; sili—

Q Silicosis.

A Silicosis.

Q Do you have any problem with shortness of breath?

[52] A Yes, sir.

Q When did you first notice yourself developing a problem with shortness of breath?

A Five or six years ago. It come on like my hearing loss, just gradually. It didn't just come up on me over night.

Q Do you know what you were doing; how you sort of first noticed that you were starting to get short of breath?

A Yes, sir. When I first noticed it, I could take my lawnmower—my yard is about as big as this courtroom—I can mow it in twenty minutes. I mean without stopping, just cut it, mow it and put my lawnmower in the garage. It takes me an hour now. I've got to stop.

Q Does the shortness of breath affect you when you take a walk?

A Yes, sir.

Q About how far can you walk before you start feeling like you're short of breath?

A About a block.

Q How long has it been since you've sort of been limited to walking a block?

[53] A I'd say about five years.

Q How far did you use to be able to walk before you got short winded?

A I used to—right after I retired, I'd go the flood wall at Williamson. It was two and a half mile long. I'd walk it twice.

Q About when was that?

A That was in '87 after I retired.

Q Is there anything else sort of in your daily activities, your routine day in and day out, that you do where you notice yourself getting short of breath?

A Yes. I'd help my wife. Before she retired I'd do housework. I mean, it got to me, runnin' the sweeper. That's when you know there is somethin' comin' on, you know, when it starts muddling all of your activities.

Q Do you understand, or believe, that you're at an increased risk for a cancer because of your exposure to asbestos?

A Yes, sir.

Q Do you have any worries, or concerns, or thoughts about that?

[54] A Yes, sir.

Q How do you feel? What goes through your mind?

A I mean I've had five operations, plus the first of February, Dr. Vera Rose, at the Cancer Center at St. Mary's. She diagnosed I had chronic leukemia.

Q Is that currently a treatable problem?

A Yes, sir. She said, you know,—when she first found it my platelets was low, the white blood cells was high. Mine, I think, was 120,000. She told me they was supposed to be between 4800 and 10,000. Well, she put me on a medication, Leukrin, and my first visit—after a month I went back to her my white blood count had come down to 12,000. And she told me, said, "Your platelets ain't gone up none." But she said, "It won't until I get your whites straightened up."

And I went back to her the next visit, another month, she told me my white blood count was ninety-two, and she said that's within range; from 4.8 to 10. She said, "Hopefully, now, your platelets will start going up." And they had went up from, I believe it was from 21,000 to 61,000. I'm supposed to have 120,000 platelets.

[55] Q So she has it under control right now for you?

A Yes, sir.

Q Do you ever worry what might happen if you get another cancer while this is going on?

A No, sir. I just have to—

MR. BOITER: That's all the questions I have for you Mr. Johnson? Would you like to maybe take a short break? Are you okay?

THE COURT: We'll take a break.

(Whereupon, a brief recess was taken)

* * * *

TRIAL TRANSCRIPT
April 20, 1998

Spangler Testimony

* * * *

[29] THE COURT: Okay. Call your next witness, please.

MR. RION: Your Honor, we call Mr. James Spangler.

(Witness Sworn.)

THEREUPON came

JAMES SPANGLER

called as a witness herein, after having been first duly sworn to tell the truth, testified as follows:

DIRECT EXAMINATION

BY MR. RION:

Q Good afternoon.

A Good afternoon.

Q Mr. Spangler, can you hear me okay from here?

A Yes.

Q All right. You've got a little hearing impairment?

A Yes.

Q I'm going to ask you if you have difficulty understanding me, you just tell me and ask me to move up a little bit. But I'm going to move just a little closer so I don't have to holler and if my voice drops or if my accent gets so bad that you can't understand me, just let [30] me know. okay?

A All right, I will.

Q All right. You're Mr. James Spangler; correct?

A That's correct.

Q And spell your last name just for the benefit of the members of our Jury who may be taking notes.

A S-p-a-n-g-l-e-r.

Q And what is your current—

THE COURT: Mr. Rion, push the mike down so we can hear him.

MR. RION: Yes.

BY MR. RION:

Q And what is your age, Mr. Spangler?
A 73.
Q And where do you live?
A Princeton, West Virginia.
Q And how long have you lived-in Princeton, roughly?
A About sixty years.
Q A good time then. Where did you grow up?
A Everywhere. I was born in Wilcoe, West Virginia and my parents were divorced when I was four or five months old. I lived with my grandparents for awhile [31] and my mother remarried and she was killed in a car accident. So from then on until high school years, I just stayed wherever I could other than I was in a mission home a couple of years in Virginia.
Q And that was a mission home for kids who were orphans or just didn't have anybody to raise them?
A Yeah, that's correct.
Q And this was during the years right after the Depression?
A Yes.
Q And the people who were still alive just ran out of money during that time?
A My grandparents lost everything they had in the '32 Depression and so they had no home of their own, and my mother remarried a man. We lived up on the Elk River and I lived with them until she was killed in an automobile accident. And then I just stayed wherever I could until they got me in a mission home for a couple of years. And then at the end of that time, two of my grandmother's sons helped her buy a home in Princeton. So I came to Princeton and started in high school at that time.

Q But when your grandparents got everybody—[32] when everybody in your family got back on their feet, they took you back in and you went back to high school in Princeton?
A That's correct.
Q All right. Now, I believe, Mr. Spangler, you married in the 1940s, did you not?
A 1944.
Q 1944. And you were married over fifty years to your wife; correct?
A 53 years and 7 months, 18 days.
Q And she passed away this past year?
A That's correct.
Q How many children did you have?
A Two.
Q And is one of your daughters in the courtroom with us today?
A Yes, she is.
Q You started with the Virginian Railroad in what year, Mr. Spangler?
A 1942.
Q And Virginian Railroad is now part of what we call the N&W or Norfolk & Western system?
A Yes, that's correct.
Q All right, sir. And your first job with the [33] Virginian was what?
A I was a carman helper or a carman apprentice. I don't know for sure which. I was just an eighteen-year-old boy looking for a job.
Q Right. And how long did you hold this job?
A About three or four months. And we're right in World War II, so I volunteered for the Navy and left for the Navy in January of '43.
Q Okay. So you had this for three or four months. To your knowledge, did you have any asbestos exposure that you can remember during that three or four months?

A No, not at that time.

Q So we'll put no asbestos exposure that you recollect. All right. Then war broke out and you entered which branch of service?

A The Navy.

Q The Navy. And that was in '42?

A '43, January of '43.

Q '43. And how long were you in the Navy?

A Until November the 6th, 1945.

Q November of 1945, U.S. Navy. And you were on board what type of vessel?

A I was in the submarine service.

[34] Q And then the peace from World War II was in 1945 and you came out of the service; correct?

A That's correct.

Q And now during this time, the early years, in the 30s and 40s, did you begin during that time the habit of smoking cigarettes?

A Yes, I did.

Q How old were you when you first started smoking?

A About fifteen or sixteen.

Q Did you back then when you were fifteen or sixteen, when you started smoking, did you realize it was harmful to your health or could cause cancer?

A No, I did not.

Q And how long have you smoked?

A Something over fifty years. I don't know. Fifteen or sixteen to '73, whatever that would be.

Q Have you tried to quit at various times?

A Yes, I have.

Q And I think recently in the last few years you quit about how long?

A. About two years at one time.

Q Now, during this two-year period, that was in the—that was recently in the '90s, wasn't it?

[35] A Yes, it was.

Q During this two-year period when you quit, Mr. Spangler, how often, if at all, did you find yourself thinking about and wanting cigarettes?

A Just daily. I'd be around other people smoking and it was really tough.

Q Would it be fair to say you're just one of these folks that crave cigarettes?

A Yes.

Q Do you have any other serious bad health habits? Are you a heavy drinker?

A No, I don't drink at all.

Q But the smoking is just something you seem to be unable to kick?

A That's right. Yes, sir.

Q Well, have you tried to do anything to limit how much you do smoke?

A Yes, I daily—some days I don't smoke more than maybe ten times. Other days, I might smoke a little more.

Q If you had known back when you were younger that cigarettes could be this hard to quit and is dangerous as we know they are now, would you have ever started smoking?

[36] A No, I wouldn't have.

Q Let's go back when you left the Navy. We're up to 1945. You come back out of the Navy. Now, you moved back to Princeton?

A Yes, I did.

Q All right. So we're back in Princeton, West Virginia. The war is over. It's 1945 and where do you go to work?

A I went to work on the Virginian Railroad.

Q Okay. Again that is now part of the N&W system?

A Yes, that's correct.

Q What was your job title?

A I was technically a sheet metal apprentice, which is—it's a combination trade. They do sheet metal work and pipe work both.

Q Where in Princeton did you work?

A At the back shop, the mechanical back shops right in Princeton actually.

Q And what type of repair work was being done in the Princeton Back Shop at this time?

A Major engine repairs, that just would be the primary shop.

Q When you say "major engine repair," is that [37] when they take the whole locomotive apart and tear it down?

A Yes, clear down to the iron and took trucks out from under it and everything.

Q Tell the members of the Jury what your job was as a member of the—the sheet metal work and pipe craft were put together as one trade?

A Yes.

Q So were you called a sheet metal worker or a pipe fitter or both?

A Well, we were called both. We—technically, on the payroll, we were carried as sheet metal workers. But 90 percent of our work was pipe work.

Q All right. So when—tell us what your duties were in connection with the heavy repair of locomotives in the back shop.

A Well, when the locomotive came in, all the pipe was removed and then another craft took the truck out from under it. The wheels,—

Q Yes, sir.

A —that's what they normally call the trucks. And we moved the jacket and the asbestos. And then the boilermakers and the machinists and various ones took over the repairs of the primary boilers.

Q Now, I think the ladies and gentlemen of the [38] Jury have been shown a photograph and let me—before I do this, Mr. Spangler, is your eyesight a little weak?

A I'm legally blind.

Q You can still walk around a room. You can see us here but you have trouble making things out unless they're real close?

A I sure do.

Q Ladies and gentlemen of the Jury have been shown this photograph which shows a steam locomotive. I want to ask you can—let me see if I can—can you make this out if I bring this up here. (Counsel indicating.)

A Yeah, that's somebody installing asbestos or insulation of some kind on what we call the cap area, I believe.

Q All right.

THE COURT: Of what area?

THE WITNESS: Where the fire box is, these knobs or caps, what they call caps, had bolts in there and then a cap went on it.

BY MR. RION:

Q Did you do this kind of work?

A Put the insulation on, yes, sir.

Q All right. So we talked about that some men were actually involved in putting the insulation on the [39] steam locomotive and taking it off. You would be the—you, as a sheet metal worker or pipe fitter, would actually be involved in doing that work; correct?

A Yes, that's correct.

Q All right. Now, when they brought it in, the asbestos over here was covered with something; am I correct on that?

A Yes. It had a metal jacket on it.

Q Is that how the sheet metal craft comes involved in this process?

A Yes.

Q Because this is covered with a sheet metal jacket?

A That's correct.

Q All right. Now, when the sheet—when you and the other sheet metal workers would come—first of all, you take

the—how did you take the—did the sheet metal come off in one big piece or how do they work?

A No, it was in—in the primary boiler, it was in pieces about 3 feet wide and 8 feet long. Other areas, it was in smaller pieces. But then you had to start at the bottom and take it off and a great deal of dust and so forth fell out on you. And then after you got all of the jacket off, then the asbestos was taken off.

[40] Q Yes, sir. Now, when—was there a wire—once you pulled the jacket off, was there anything holding these pieces of asbestos on the boiler?

A Yes. When it was installed, they would put wire around the boiler and then the asbestos would fasten to the wire with another wire of design that was made to bend over and hold the asbestos. Then in removing that, after the jacket was removed, on top of the boiler and engine, they took a chisel and cut those wires and just allowed asbestos to fall and it made a terrible cloud of dust, you know.

Q Would it just fall and hit the floor?

A Yes. Anybody in the general area would just be covered up.

Q That's what I want to ask you. Now, you're in the sheet metal/pipe fitter craft. While you're doing this work in the Princeton Back Shop, would there be other crafts who weren't working directly on the asbestos who would be in the same area as the sheet metal workers?

A Yes.

Q And when this asbestos comes off and hits the ground and creates—you say it's a cloud of dust. Tell us a little bit about how dusty it was.

A Well, it was—I don't know how to explain [41] it any more than it was an extreme cloud of dust that—don't know how to explain it any more than that.

Q Would it be cloudy enough at times it was, even hard to—like foggy to see through?

A Yes, in that immediate area it would. And, of course, it would dissipate as it spread, you know.

Q Would there be other crafts in that area who would be enveloped in the same dust that you were in?

A Yes.

Q What other crafts would that be?

A Machinists, electricians, boilermakers, carpenters.

Q Now, once the asbestos hit the ground, who cleans it up?

A The laborers generally cleaned it up. They used shovels and brooms and shoveled it up into hoppers and hauled it to a place they store it.

Q Then they used brooms to sweep up dust off of the—

A Yes.

Q When you use a broom to sweep up dust of asbestos already on the floor, how does that affect the dust conditions in the shop?

A Well, it made dust, of course. They were—[42] they swept pretty vigorously sometimes, you know. Then shovel it and then just picking it into a hopper.

Q I think you told us in addition to taking this asbestos off, you'd be involved once they finished working on a locomotive and putting new asbestos back on; is that correct?

A That's correct.

Q I have brought with me, Mr. Spangler, some pieces of—these are non-asbestos material. It is not asbestos. Let me get one. I have here (indicating) some stuff involved from an insulating shop that's asbestos-free. It doesn't have any asbestos in it, so you don't have to worry about that. But I want to ask you if you could—do you remember the photograph I showed you a minute ago?

A Yes.

Q Can you see this from this? (Counsel indicating.)

A Yes.

Q Feel on it a little bit.

A (Witness complies.) What we used wasn't that thick

Q It was thinner?

A Yeah, and it possibly an inch-and-a-half. [43] And it was 6 inches wide and about 3 feet long.

Q Yes, sir. Was the feel of the material similar?

A Yes.

Q Kind of chalky?

A Yes.

Q Like I notice here when I pull this here (indicating), it gets on my fingers.

A Yeah, but it wasn't as solid as this is.

Q It was more crumbly?

A Yes.

Q Now, when you take—when the sheet metal workers take the block material, which you say is a little thinner but maybe a little more crumbly and you go to put it on the locomotive, was there any cutting or shaping you had to do with the material to make it fit the contour of the boiler?

A In some areas there was. Of course, there's pipes and so forth that come directly out of the boiler. You have to cut to fit around that sort of thing. But as far as fitting the contour of the boiler, as big as the radius of the boiler was and no wider than the insulation was, we didn't have cut it for that reason.

Q But you did have to cut this?

[44] A Yes, for connect pipes and set it. Different things that came out of the boilermaker is attached to the boiler.

Q I understand. So if it didn't—as far as the surface wasn't smooth, you didn't have to use this. What did you use to cut this?

A A saw, a hammer, or break it, or anything.

Q Was that a dusty process?

A Yes.

Q Were there days, Mr. Spangler, when you come home from doing this you could just—maybe not when you came home but when you finished doing this kind of work, you could look at your clothes and you would just be covered in white like a snow bunny?

A Yes.

Q And you did this type of work from 1945, beginning for the first time from 1945 until about when?

A Late '49.

Q All right, late '49. Now, Mr. Spangler, I'm going to direct the members of the Jury's attention to the excerpt we have on the AAR documents, 1935. Now, if I'm referring to the date 1935, we're talking about fourteen years before you began employment in the sheet metal/pipe fitting trade; correct?

[45] A Yeah.

Q Now, the 1935 AAR documents talk about in regard to asbestosis and silicosis. On Page 90, I'm going to read to you some—it says, "In the way of prevention, it becomes necessary to educate all concerned." Now, when you were doing this work, were you actually the man putting the asbestos on and tearing it off; did anybody from the railroad educate you about the hazards of asbestos dust?

A No, they did not.

Q I put "yes" or "no" for that?

A No.

Q All right. Number 2 says, "Get rid of the dust." Did they tell you—did they educate you that you needed to rid of this dust?

A No.

Q Number 3 says, "Sprinkle the working area with water." And they're talking about using water to reduce the dust. Did they tell you to do that?

A No.

Q Number 4 is, "Have employees wear inhalers," respirator type things. Did they tell you you should wear an inhaler to prevent—

A No. No, they did not.

Q And, finally, "Have frequent analysis of the [46] dust content of the air at different times during the working hours." Did you see them walking around at frequent intervals doing dust counts to see how much asbestos was in the air?

A No, I did not.

Q Well, it says there frequent. Did you ever see them do this?

A No, I never did.

Q That takes us up until 1949. Oh, we're still—one other thing. Did the Virginian take the old asbestos and grind it up to make cement to be used?

A Yes, they did.

Q And did you, yourself, do that?

A On occasion, I did.

Q How many times would you say you did that?

A Oh, half a dozen times probably because it primarily was some other person, another party's job. But, occasionally, I would fill in and do that.

Q So you would take this old material. What would you put it in to grind it up?

A They had a grinder that had teeth sort of like your fingers that matched together and you put it in and it came out of the other end.

Q Was that dusty?

[47] A Pretty dusty, yes.

Q Compare the dust to when you put the jacket off the steam locomotive and everything dropped and hit the floor. Compare that dust to the dust from the grinding. Which was worse?

A Well, when you took it off the engine, you just didn't run into anything worse than that.

Q Is it a close call or easy call?

A Oh, it's a easy call. The grinder wouldn't put off more than 10 percent of what they did when they dropped it from the-locomotive.

Q Why is that from your experience?

A Well, it was dry and brittle from being on the locomotive for a number of years and then it dropped approximately—the top part would drop approximately 18 feet and then the belly would come under and fall on the engine and there was steel framework that it hit on and broke.

Q Did the railroad ever suggest instead of letting it drop that the workers should hand it down carefully so it doesn't break and create dust?

A No, they didn't.

Q Now, in addition to the work on the steam locomotives during the same period, did you do work [48] repairing pipes?

A Yes, I did.

Q And were the pipes insulated?

A Some of them were.

Q The ones that were insulated, was it with an asbestos material that the substance of it was similar to this?

A Yes.

Q Mr. Spangler, I have a piece again of nonasbestos pipe covering. I'm going to ask you—let me get it. Can you see—

A Yes.

Q —this? (Counsel indicating.)

A Yes.

Q Is it similar to this? (Counsel indicating.)

A Yes.

Q And you take—say, if a pipe is here, you'd take two pieces of this and fit it around a piece of pipe?

A That's correct.

Q. When you did that, did you have to sometimes saw or cut this insulation so it would fit around a pipe?

A Yes, we did.

[49] Q Did that process create dust?

A To a certain degree, yes.

Q Did anybody from the railroad ever tell you should use exhaust ventilation or be in an area where you have some

type of mechanical device to suck the air away when you cut this?

A No, they didn't.

Q Did they warn you this could be hazardous?

A No, they did not.

Q So, on the steam lines, you would be involved in taking this old stuff off of a steam line to be repaired?

A Yes.

MR. BAKER: I would object, Your Honor, I don't believe he said there was any of that on the old steam lines. I think he said some lines had and some lines didn't. He's testifying to the facts and evidence.

BY MR. RION:

Q But if a pipe had it on there and you had to repair it, would you have to take it off?

A Yes, we would.

Q And did that happen?

A Yes, it did.

Q And if it was a line that needed to [50] insulated, if you tore it off, would you have to put new pipe covering back on it?

A Yes, we would.

Q So this takes up until 1949 and I think from '49 until the early 50s you were away from the Virginian Railroad and not working there; is that correct?

A That's correct.

Q And you went back to the Virginian, I believe, in Narrows, Virginia?

A Narrows.

Q Narrows. And when was that?

A It was early in 1951, I believe.

Q 1951. Do you know how to spell Narrows.

A N-a-r-r-o-w-s.

Q And where were you working there?

A At the time, I was with the Virginian Railroad.

Q Okay. So you were in the powerhouse and the powerhouse is where they generate steam to heat the facility?

A No, they made their own electricity.

Q Oh, okay.

A And they had electric locomotives in some areas. That supplied the generating powerhouse for [51] electricity.

Q Did they have boilers that generated heat and power?

A Yes, they did.

Q And were the boilers insulated with boiler insulation similar to what went on the steam locomotives?

A I don't really know. That would have been under boilermaker.

Q All right. So you weren't working on the boiler?

A No, I wasn't.

Q What were you doing instead of making—

A I was a pipe fitter, but my principle job at that particular place was insulating pipes.

Q Okay. So when you say your principle job was insulating pipes, it would be the same type of thing we just talked about?

A No, we didn't use the preformed.

Q Okay. What did you use?

A They used the vats and we used a little power saw and cut it into strips to fit the various radiuses of-pipe. A pipe might be eight inches in diameter. It might be ten inch.

Q Was it asbestos-type insulation you were [52] using?

A Yes, it was.

Q But you had to use what kind of saw?

A A table saw. A little electric table saw.

Q And was that a dusty process?

A Yes, it was.

Q And during that time, did the railroad recommend any type of exhaust insulation to rid the area of dust?

A No, they didn't.

Q Did they give you a respirator to wear when you were doing this type of work and tell you that you needed to wear a respirator to avoid this dust that could hurt you?

A No, they never did.

Q How long were you in Narrows?

A Approximately four or five months.

Q And then where did you go?

A I went back to Princeton.

Q That would be back in the back shop?

A Yes. I worked in the car department thirty days and back in the back shop.

Q Okay. 1951 you're going to have thirty days in the back shop, I mean, in the car department. Do you [53] remember any asbestos exposure in the car department?

A No, sir, I don't.

Q You don't, okay. Then you went to the back shop?

A Yes.

Q And what were your duties there?

A The same things that it was earlier, repairing steam locomotives.

Q As far as asbestos exposure, the same type of thing we have talked about all along?

A Yeah, that's correct.

Q And how long were you there?

A About three or three-and-a-half years. I don't know exactly.

Q Up to about '53 to '54?

A Yeah, about '54 and they began the diesel line.

Q And did you get laid off then?

A Yes, I did.

Q Up to 1954, still were they—during any of this time when you're back on the steam locomotive doing the same type of work,—

A Yes.

Q —were there any warnings or work [54] procedures recommended by the railroad during this period?

A No, there was not.

Q And in 1954, you say you were laid off?

A Yes.

Q And when did you come back?

A I went to—I went to work for the N&W Railroad in Bluefield in 1955.

Q How long did you—1955, N&W. This was in Bluefield?

A Yes.

Q And what did you do there?

A Pipe fitter/sheet metal worker.

Q Did that job involve asbestos exposure?

A Yes, it did.

Q How?

A Well, in pipe insulation like we were talking about, the preformed pipe insulation. And then they had a two-stall shop, they call it a back shop, and they would take the jacket and the insulation off of the area over the fire box and then that would have to be reinsulated and the jacket put back on. What I talked about earlier was like working on the caps, they call it.

Q And how long did you stay doing in Bluefield at the N&W before you were laid off again?

[55] A Well, I was—let's see, I was laid off in '59 when they began to get diesel.

Q So you went from '55 to '59 here doing that work in Bluefield and then laid off in '59 and I believe you were off until when?

A I don't remember exactly. It was about live or six years.

Q 1959 until the mid-60s—

A Yes.

Q —you were off. And then did you come back to the N&W?

A Yes, I did.
Q And that was in what year, the mid-60s?
A I don't know. It was in the mid-60s.
Q Mid-60s, N&W. And you stayed there until when?
A 1980.
Q 1980. And what, still doing sheet metal/pipe work?
A Yes.
Q And did you still have to during this period, were you still involved in repairing steam lines?
A Yes.
Q And did you still during this period have to [56] tear old asbestos insulation off?
A Yes, we did.
Q And did you still have to put new asbestos insulation on?
A Yes, we did.
Q In fact, as late as the mid-1970s, were you still in the employment of the N&W, directed by the N&W to tear asbestos insulation off of old pipes?
A Yes.
Q So as late as the mid-1970s when the N&W had you tearing asbestos off of old pipes, did they then in the mid-70s tell you that asbestos was harmful?
A No, they did not.
Q Did they recommend any kind of protection in the mid-70s?
A No, they did not.
Q Mr. Spangler, when did you first found out from a doctor that you might likely have an asbestos problem?
A '92, 1992.
Q I think, was that when you were in Florida?
A Yes, in Kissimmee, Florida.
Q Tell us what you were doing down there and what happened to you.
[57] A Well, my family and I were going down there on vacation and I became ill and they—I went to the emergency

room at the Humana Hospital and I had pneumonia and I spent that vacation in the hospital.
Q Were—
A And the pulmonary doctors told me there that I had asbestosis.
Q Now, this was where in Florida?
A Kissimmee.
Q Is that down in Disney World?
A Pretty close to Disney World, yes.
Q Yeah. And you were down just with your—who all was down there with you? Your wife—
A My daughter and her husband and my wife and grandchildren.
Q Now, what was—the plan was to see what down there?
A Well, Disney World and various other things that are to be seen. There's Sea World and Disney World. Because we had been to all the places, but just to accompany the children.

MR. RION: Could I see Exhibit 9, please?

BY MR. RION:

Q And but you ended up spending about the [58] whole time in the hospital?
A I spent the whole time in the hospital, yes.
Q I believe that's it right there. This is Exhibit 9. I would like to just show the date here, first of all, the institution Humana Hospital, Kissimmee, Florida. Is that where you were, Humana Hospital in Kissimmee, Florida?
A Yes, it was.
Q And the date, please, 4-13-92; does that coincide pretty much with—
A Yes.
Q —when you were down there? Let me see that a moment. On the Diagnostic Impression, number 1 and 2, if we could focus on that. It says here: "The patient has increasing respiratory distress with a low-grade temperature

and productive cough." Now, this respiratory distress, it means trouble breathing. Were you having that at this time?

A Pardon me?

Q Were you having trouble breathing at this time?

A It goes on to say: "The patient had had heavy dusty smoke—"

MR. BAKER: I'm going to object to this [59] unless we're going to have the doctor here to testify about this so he can explain what this is and what these terms mean and so forth. I don't think that—I mean, the Jury can look at it in evidence, read it or whatever, but for us—without a doctor or somebody to explain here what the terms mean, I don't think that it's appropriate.

MR. RION: I can ask him what happened during this visit.

THE COURT: Sustained.

BY MR. RION:

Q Now, on 2/2, it says: "Chest x-ray is consistent with pulmonary fibrosis. I suspect the patient has asbestos exposure and may well suffer from asbestosis." Is this treatment when they first told you that you likely have a problem from asbestos?

A Yes, that was the first time.

Q And you were in the hospital, about how long was this particular episode?

A I guess in a week.

Q During this week, were you able to perform your breathing on your own or did you require special medical assistance in breathing?

A No, nothing other than they did administer oxygen.

[60] Q So you did—

A No mechanical means or anything like that.

Q You were not put on a ventilator, but you were put on oxygen?

A Right.

Q How was the oxygen administered?

A Through my nose here (indicating).

Q How, long did they do that?

A Well, I recall most of the week. I had a hard time persuading them to release me. My family had to go home and I had trouble persuading them to let me go. But they did release me when my family had to leave.

Q Have you since then, since that hospitalization, have you been hospitalized for pneumonia since then?

A Yes, two other times.

Q And was each one of those about the same length, about a week?

A It was three days to a week, something like that.

Q And did each one of those involve the use of some article of oxygen to keep you breathing?

A Yes.

Q At this time back in or around '92 when you [61] were down in Florida, is this around the time when you first noticed shortness of breath?

A Yes.

Q Mr. Spangler, I want to talk just briefly about how this—just exactly what your shortness of breath is like. Do you own some rental property that you help—you go out and watch and supervise work on, occasionally?

A Yes, I do.

Q Do you have a helper who drives you to the doorsteps of the property?

A Yes, I do.

Q And does he bring a chair inside for you?

A Yes, he does.

Q And do you then sit in that chair and supervise?

A That's correct.

Q Do you—now, I don't want to embarrass you or anything, but do you sometimes find yourself—when your helper brings your chair in and you walk in the door, by the

time you get in and he pulls up—now, he pulls up as close as he can get to the house, down [sic] he not?

A Yeah, he does, right.

Q Do you on occasion, by the time you get [62] inside and get in your chair find that you are somewhat winded?

A Sometimes, yes.

Q What I want to do—let me ask you this, Mr. Spangler, are you a person who likes to complain?

A No, I'm not.

Q Will you do about anything you can to avoid complaining?

A Yes, I will. I grew up in the hard world so I don't like to.

Q Yes, sir. Did I try to tell you last night you were going to have to describe for the Jury what your symptoms were like?

A Yes, you did.

Q And did you tell me you didn't want to do that?

A Yes, I did.

Q All right. Well, here is what I'm going to do to try to not make you complain, but I want you to—don't brag on yourself and try to say that you can do more than you can. All right, fair enough?

A All right.

Q Now, do you go—who gets your mail for you? Do you send somebody out to fetch your mail for you?

[63] A I usually do that.

Q How come?

A Well, it's one of the things I've been doing for years.

Q Do you like to be waited on?

A No, I don't.

Q All right. Now, how far is your mailbox from your front door?

A Just about a 100 feet.

Q About a 100 feet. Are you a pretty good judge of distance?

A Pardon?

Q Are you a pretty good judge of distance?

A Yes, I am.

Q All right. So about a 100 feet. Now how many steps is it to get in and out of your house, how many steps are we talking about?

A One step.

Q All right. Now, I'm not going to make you walk a 100 feet, but I would like for you just to demonstrate for us. Come down and just show us about how—the pace you like to walk. Just show your normal pace.

A (Witness complies.)

Q Now, I got you to walk with me a little bit [64] last night, didn't I?

A Well, this is about it.

Q All right. That's about how you like to walk.

A Yes.

Q You can turn around and walk back now if you want to.

A All right. Thank you.

Q I'm not going to make you walk any more than that. So if you go get your mail and come back, we're talking about walking—you say it was about a—how far, 110 feet, did you say?

A Yeah, as I know it, it's a 110 feet because I've used an extension cord to—

Q All right. So if you go there and back, we're talking about 220 feet; right?

A Right.

Q Now, just by comparison, a quarter of a mile is 440 yards; right?

A I think, yes.

Q If you've run track, or if you have, you know, of course, 440 is a quarter of a mile. And each yard is 3 feet; right?

A Right.

[65] Q So a quarter of a mile is 440 times 3 and I'm just going to say 1200 plus. Fair enough?

A Okay.

Q All right. How long does it take you to walk out 110 up and 110 back to get your mail?

A Well, I've never really timed it, but it was be approximately five or six minutes.

Q Okay. About five minutes. To give us some idea. That's for 220 feet, you're talking about it—if you would have walked that pace for a quarter of a mile just to do the math, it's going to be over four times that distance; correct?

A Yes.

Q So if you would have managed to walk at that pace for a quarter of a mile, we're talking about twenty minutes per quarter; right?

A Yes.

Q Now, when you get back after walking 220 feet at this pace, what do you do?

A I'd probably sit down and rest and open my mail.

Q. Are you breathing hard enough when you do that that I know that I know you can't see other people, but you have other people at home with you sometimes. Were [66] you breathing hard enough where from using your common sense, somebody standing right here could probably hear you breathing?

A Yes, they could.

Q So are you panting after doing that?

A Well, I need you to define panting. I don't understand.

Q Somebody else could hear you breathing from—(counsel indicating) like that.

A Similar to that, yeah.

Q Okay. Is this shortness of breath getting better or worse or staying about the same?

A It's getting worse.

Q Does the fact that it's getting worse cause you some concern?

A Yes, it does.

Q Does your experience in the hospital with this oxygen kind of have some bearing on that?

A Yes. I'm concerned about being on oxygen constantly or being a burden to my children.

Q I promised you I wouldn't make you talk long about your respiratory symptoms because I know you didn't want to so I'm going to quit.

A Okay.

[67] Q Thank you.

MR. BAKER: Can we approach just a second before I begin cross examination?

THE COURT: Uh-huh.

(Counsel approach the bench.)

MR. BAKER: Good afternoon, ladies and gentlemen. What we've agreed on is that—a moment ago Mr. Spangler testified that between 1950 and 1955 he worked approximately three-and-a-half years in the back shop at Princeton. For those of you who have taken notes and remember that, we have agreed that actually during that period of time he only worked a very short period.

MR. RION: For the N&W.

MR. BAKER: For the N&W or for the Virginian.

MR. RION: Right, correct, just for that '50 to '55 time frame. We were off on that and we were all agreeing on it.

JUROR: Do you care if I say something? The Virginian Railroad, wasn't it taken over by the N&W or what?

THE COURT: We'll get to that. You'll be given some information about that folks.

CROSS EXAMINATION

BY MR. BAKER:

[68] Q Good afternoon, Mr. Spangler. We've met before haven't we?

A I believe we have.

Q Okay. You recognize the voice.

A I recognize the voice but—I recognize the voice.

Q Okay, but you can't see—would you like for me to come up closer or can you hear me pretty good?

A No, that's fine. Thank you.

Q Mr. Rion asked you briefly about some or mentioned briefly some of the rental property that you own in Princeton. It's my understanding you have about twenty-three houses; is that correct?

A Yes.

Q And then you're also involved in a corporation that you and your son own which has four rental houses; the corporation owns three or four?

A Yes, that's correct.

Q And you do still help actively manage those even though you don't do any of the repair work yourself; is that right?

A That's right.

Q Now, you talked a minute ago about your period of work for the Virginian between 1945 and late '49 [69] and, I believe, you characterized all that work as being in the back shop. Do you remember that?

A Yes.

Q Do you remember when we had your deposition you told me that about sixteen months of the period from '45 to late '49 you actually worked as a sheet metal worker in the sheet metal worker's building?

A Yes.

Q So, then actually then between late '45 and whenever you were furloughed in '49, sixteen months of that time was

actually in a separate building, the sheet metal worker's building; correct?

A Not entirely. The sheet metal workers made the jacket and then helped install it and, I mean, the people that worked on the chimneys, we were all sheet metal workers.

Q Okay.

A So, I didn't spend that entire sixteen months in that particular area.

Q But you did work about sixteen months, though, when you would have been building new jackets or building pipe in the sheet metal worker's building?

A Yes, that's correct.

Q Okay. You weren't in the back shops?

[70] A That's right.

Q Okay. You talked a moment ago and we looked at this piece of insulation and you said that you installed some of this insulation during the time that you worked as a pipe fit—or sheet metal worker; is that right?

A Yes.

Q Now, when we took your deposition, I asked you about the different types of lines that were insulated. Do you remember that?

A Yes.

Q And do you remember or was your answer at that time and would it still be today that the only lines that were insulated on the actual steam locomotives were the oil lines?

A Yeah, but I didn't assume we were talking about steam locomotives with this preformed stuff.

Q Okay. But—no, no, I understand you're not saying that preformed insulation was used on the steam locomotive. Let me ask you this again and see if you—

MR. RION: I'm not—Your Honor, I'm not sure if he was finishing his answer. He may or may not have been. Can you answer, Mr. Spangler?

THE WITNESS: Yes, I did tell him that the oil lines had insulation on them. And at that time, I forgot [71] there is a steam line that comes from the top of the engine to the water injector that's also wrapped with wrapping.

BY MR. BAKER:

Q Okay.

A But that's all of the wrapping on an engine then.

Q Okay.

A As well as I can remember.

Q When you worked with this preformed insulation, if you didn't have to cut a piece of it, that wasn't a dusty job was it, installing and removing that?

A It would depend on what you call dusty. There would be some dust, not in comparison to the back shop. But there would be some dust.

Q You wouldn't say that there was a great deal of dust created whenever you had to do pipe work with preformed insulation, would you?

A Not a great deal, no.

Q Now, my understanding of steam lines is that steam flowed through those lines and that sometimes the pressure would cause a break; is that right?

A That's right.

Q And if you had a break in the line, it would cause—the water would run out the bottom of the jacket [72] that was over the steam line; is that right?

A On occasion it would.

Q Okay. And the steam lines that I'm talking about now, just to make sure we're on the same page, are the steam lines that ran through the yards?

A Yes.

Q Okay. If you had a break in a steam line and you had to replace a piece of that insulation, would the insulation that you were replacing generally be wet when you took it off?

A Well, right in the immediate area of the leak it would be. But very often you would have to take off more, I mean you couldn't—in other words, the way they looked at it, if there was a hole in the pipe there, the whole thing was about that thin. But the immediate area might be wet and sometimes it wasn't wet.

Q Okay. Now during the time, I guess it probably would have been about 1946 to about 1966, your work with the railroad was somewhat sporadic and you did residential plumbing in your spare time and the times you were laid off; is that right?

A Yes, that's right.

Q You talked about the work you did at Bluefield. Bluefield differed from Princeton in that they [73] didn't have a heavy repair facility at Bluefield, did they?

A No, they didn't.

Q They didn't do the complete stripping down of the locomotives?

A No, they did not.

Q Now, the only type of insulation you did on the locomotives at Bluefield was the caps that you talked about?

A That's correct.

Q Between 1955 and 1959 while—you were at Bluefield during that period; is that right?

A Yes.

Q Now, I asked you about the steam lines on the locomotives a minute ago but I didn't confirm. Were the water lines or I believe you told me in your deposition that neither the water lines nor the air lines on the steam locomotives were insulated, were they?

A Usually they weren't.

Q Okay. I think you were furloughed from Bluefield from about 1959 to about 1966. Does that sound about right to you?

A Yes, something like that. I'm not sure, something like that.

Q If those were the dates you gave me in your [74] deposition, would you have any—

A That's about it, yes.

Q Okay. Because I know a minute ago you—the best you—

A I'm positive I was furloughed in '59. I'm just not sure when I went back.

Q It could have been '65; it could have been '67?

A That's right, that's correct.

Q Okay. They didn't actually do any locomotive repair at Bluefield once you returned to work there in 1966 to 1980, did they?

A No, they didn't.

Q And all that work from 1966 on involved diesel locomotives; is that right?

A Yes, it was.

Q I believe you told me earlier that the pipes on the diesels were not insulated with anything were they?

A No, they weren't.

Q In talking about working with the pipe, and I guess that would be yard and shop pipe at Bluefield, would you still agree with me that about 75 percent of the work you did from 1966 to 1980 at Bluefield involved work on the diesels while 25 percent of your work was work in [75] the yard or shops?

A Yes.

Q And in doing the pipe work at Bluefield from 1966 to 1980, that all involved preformed insulation, didn't it?

A Yes, it did.

Q And my understanding that you hurt your back in 1979 or 1980 and that's why you stopped working for the railroad then; is that right?

A That' s correct .

Q You smoked Lucky Strike brand cigarettes, Camel brand cigarettes, and Kool brand cigarettes. Were any of those filtered?

A No, they were not.

Q I believe you've told me before either in your deposition or maybe something written that you started about 1938 and you stopped in 1990?

A Something like that.

Q And then you started back in 1992?

A I believe I stopped in '92.

Q Okay.

A And started eighteen months, two years later.

Q Okay. Were you still smoking when you went [76] to the hospital in Kissimmee, Florida or had you stopped by that time?

A Well, I hadn't smoked for about a week.

Q Okay. Did the doctor down there that you saw counsel you that you shouldn't take back up smoking again?

A The only thing he said—I told him that I had quit and he said well you can only qualify yourself as a quitter in a week.

Q It turned out he was pretty well right, wasn't he?

A That's correct.

Q You've seen the warning labels that appear on the cigarette packages and first started appearing back in the 1960s, haven't you?

A Yeah. I don't remember when they first appeared.

Q But you remember seeing it for quite a few years, don't you?

A Yes.

Q And some of your treating doctors have told you to stop smoking, haven't they?

A Yes, they have.

Q But you still smoke today, don't you?

[77] A Yes, I do.

Q Would it be fair to say that it's just a personal decision you've made that you—that the benefit to you from smoking outweighs the risk?

A I don't know whether you could say the benefit outweighs the risk or not. The addiction, I guess, outweighs the risk.

Q You enjoy the cigarette smoking enough that you keep doing it even though you know it's harmful?

A I suppose so.

MR. BAKER: Okay. I don't have any further questions for you Mr. Spangler. Thank you.

THE WITNESS: Thank you.

MR. RION: One quick follow-up.

REDIRECT EXAMINATION

BY MR. RION:

Q Mr. Spangler, when you and I were talking about insulation on pipes, we were talking about insulation in the shop not on the locomotive; is that correct?

A That is correct.

MR. RION: Okay. Thank you.

THE COURT: Okay. Thank you, sir. You can step down.

THE WITNESS: Thank you.

* * * *

TRIAL TRANSCRIPT
April 21, 1998

Weir Testimony

* * * *

[31] into evidence, went in and recommended things that the AAR had been talking about with respect to moderating, I guess, exposure, and so forth, is that a fair statement?

A Indeed they made that statement, yes.

Q And you've looked at those documents?

A Yes.

Q So what do they say about his whole issue? Explain to this jury what those documents do or do not do with respect to this idea, the scientific state of the art in the time period of which things are happening?

A Well, when you read all of the documents, I've had presented to me, from the initiation on through to as long as we had them, there was a good story to tell, and the story was that they didn't feel that they had a problem on their railroad, but—

Q How do you know that?

A Only by the words that were written in the documents. No other knowledge.

MR. RION: Judge, if he wants to point the place that it's put forth in the documents—

THE COURT: hat's a fair objection.

MR. RION: But for him to set there and [32] tell us what he thinks Alton Railroad was thinking—

THE COURT: That's the question.

MR. TURNER: Have you read the documents?

THE WITNESS: I have read the documents.

MR. RION: (Inaudible)

MR. TURNER: Well, that's cross examination. I'm asking him to testify about his knowledge.

MR. RION: ___ the best evidence the documents—

THE COURT: I'm gonna permit him to testify to whatever specific content he recalls in these documents that supports his conclusion.

MR. TURNER: Thank you.

EXAMINATION CONT.

BY MR. TURNER:

Q Based on what you've reviewed in those documents, was there a separate representation made in those same documents that there was illness, asbestosis on the Alton Railroad?

A No. No, in those records there was no reference that they had an asbestos health problem in that railroad.

[33] Q Is there any scientific rationale to justify a railroad in West Virginia, I'm thinking about our case here, the N & W, so forth—whether or not the exposures or lack of exposures that were here were similar or different to what Alton Railroad was perhaps discussing and dealing with in Illinois?

A Well, they weren't seeing disease in Illinois by the documents that have been made available; by the letters that were written. And you weren't seeing—you weren't seeing in your railroad here—you weren't seeing any evidence of disease, so in both cases you were not seeing evidence of disease.

Q Let me ask you while I'm talking about documents—textbooks, medical texts or scientific texts, and they existed—there were textbooks, of course, written in the '30s and '40s, and so forth, is that correct?

A Yes.

Q What would medical textbooks, scientific texts saying about these issues that we're talking about, with respect to asbestosis, railroad workers, so forth?

A Well, one in particular written by Dr. [34] Ramsey, 1939—it was written in 1938, but became public in 1939. In the title of his book was *Diseases of Silicosis and Asbestosis*. And there is not reference anywhere in that book as to railroad exposures. That was the main purpose of that book.

Q What else over time?

A And ____ there was a *Manual of Pharmacology* which they discussed all of the effects of chemicals for medical people, by Sollmann, I believe. Toren Sollmann, I believe. That stated, for the training of physicians that in Dr. Sollmann's opinion, the asbestos was a minor problem in comparison to the silicon problem, and that most likely the asbestos, any disease associated with asbestos would be because of the release of the silica from the silicate material that it is. And he's wrong, but that's the sort of thing that was being promoted.

Q Was he negligent for saying that?

A No, he was not. He's been highly regarded over the years for his judgment.

Q So why not just do whatever the Alton Railroad did? How come everybody didn't do that? Why is that scientifically reasonable based on current [35] evidence at that time?

A Well, I don't know the reasons, but I do know that there was good rationale for why should we spend money in one location for doing something that's required in another location, but not pertinent, or does not change the health in a worker. And there is no evidence anywhere that any of the events or situations that the Alton people put into place changed the health of one worker within the Alton Railroad.

Q Isn't that just putting a price on worker health? When you start saying things about money and so forth?

A I don't think so. I think it's just being practical. It's running the railroad, in this case, in a manner that you think is appropriate. You don't just go out and willy nilly spend money for solving problems. It would be like His Honor asking me to do a carbon monoxide analysis in this room. It wouldn't be proper practice to do that in this room and it would be a foolish waste of his resources.

Q But you could do one?

A I could do one, yes.

Q Was it negligent, in your opinion, for [36] the N & W not to do the things that the Alton Railroad had done in the given time periods with which we're concerned in this case?

A Not based on what was known and appreciated about the hazards in that work place or in that class of work places at that time, no, sir.

Q Let me go back just for a minute to the chart we have up here and ask you just in a way of commentary, did the initial reference in this public health bulletin 241, to this TLV, did that in any way reduce the consumption of asbestos in American Society?

A There is certainly no evidence for it based on the use chart throughout the 20th century, no, sir.

Q These Alton documents were from what year?

A They were also from 1936, 7 and 8. I don't think they went into '39, but in that era.

Q Nothing down around here somewhere? (indicating)

A Yes, sir.

Q What happened with respect to consumption of asbestos in America after these Alton documents? [37] What, did it go up, did it go down?

A Well, it went up remarkably as the pattern showing there, with the advent of World War II and the use of asbestos multiplied remarkably since then.

Q Did the Alton documents or the Driessen study—what is that?

A The Driessen study is that bulletin 241.

Q Okay. Were either of these documents working together some kind of alarm clock that woke up the fields of toxicology or industrial hygiene to radically change the way in which asbestos was considered and recommended levels were set and so forth?

A Well, certainly that was the number—the number that Driessen came up with, it was the number that eventually in the mid 1940s became the accepted number by the American Conference of Governmental Industrial Hygienists that stayed without variance until 1968.

Q So from this point, thirty years?

A Yes.

Q The level I think you testified—it was not necessarily sufficient to protect against [38] asbestosis?

A That's correct.

Q You're familiar with Lee and Selikoff in 1979?

A I am.

Q Is that the same Selikoff, or relation at least to the Selikoff study of the mid to late 1960s?

A It's exactly the same gentleman.

Q First of all Lee and Selikoff, was it a textbook, was it a study, what was it?

A Well, they published the same report in a couple of different places. One of them was in something called *Environmental Research*, the journal. And what it was a comment, a commentary about the state of affairs, looking back on the issue of asbestos hazard.

Q Looking back in time from 1979?

A Yes.

Q As of that year 1979, I think you've described that there was an emerging pattern of illness in some populations of the railroad industry?

A That's correct.

Q What did Lee and Selikoff say, then, [39] about looking back from that point after the pattern emerged?

A I don't have the exact quote but they summarized, encapsulate in the last paragraph of their article that it's amazing that when you look back on it, all of the elements that could have been put in place were in fact there, but that we didn't have sufficient—he was using "we" as I understand it, meaning medical science and he was really the fore front of investigation of asbestos research, we didn't have the proper judgment to be able to make the assessment that we currently have and are able to make in 1979.

Q Was Lee and Selikoff and the rest of science negligent before 1979 for being ill-equipped for not being able to make those judgments?

A Not one bit.

Q Let me just ask you some questions about your opinions in this case with respect to this case and I have a few questions to ask you about the plaintiffs, individually.

Should the railroad have considered its employees to have been in an elevated risk of injury from asbestos exposure in the 1930s?

[40] A There was no evidence for that so the answer would be no.

Q 1940s?

A No evidence for it and, in fact, there was accumulating evidence that would support just the opposite. So the answer would be no.

Q How about the 1950s?

A No.

Q '60s?

A No and certainly because they were then as it were, getting out of the application of asbestos, so no, at that point they were not thinking.

Q When should they have thought that?

A There is no time, based on the then current use, understanding on the first hand that their use of asbestos, for the most part, had stopped in the mid-50s, and they then only

had residual for a few years and then almost nothing, down to the present. Just like any other industry, there is no basis ever to consider that they ever exposed their current employees above those levels that have been considered to be recommended, and therefore, safe in that particular work place.

[41] Q Did that knowledge only come after they stopped, by about twenty years, the use of asbestos products?

A Indeed that's what all the data support, yes.

Q Let me just ask you about some of the specific work procedures and alleged exposures that plaintiffs have testified to in this case and perhaps in their sworn deposition testimony. I'm going to ask you some questions.

There is an allegation that there is asbestos exposure from riding in the locomotive cab of a steam engine and that in that particular job, the unit is going, the air is coming through and exposes crew to asbestos particles. Are you familiar with that allegation?

A Yes.

Q Have you done anything to make yourself aware as a scientist about whether or not there are excessive exposures from that type of activity?

A Yes.

Q What have you done?

A Well, I've done two things. I had [42] occasion at one time to have opportunity to have an articulated locomotive from the Norfolk & Western at my disposal and I instrumented that locomotive with a variety of scientific instruments to evaluate whether or not materials coming from under the metal skin could get back into the engineers face.

Now, we didn't have asbestos on it at the time I tested it, but we had to use a different technique and it was called a tracer gas technique. What we did was we put a gas out there at a point that we would be presumed to release asbestos and then measure its concentration back in the engineers breathing zone. And at no time would the asbestos that would

have been there have had opportunity to gain entry into the cab area in a meaningful manner.

I think the highest ratio is something like a hundred fifty thousand or two hundred fifty thousand to one chance of one particle getting back there if it had been released.

Q That substitute measure that you've described, is that acceptable in your discipline as a way to try to characterize asbestos exposure?

A It's a very acceptable procedure within [43] the field of Toxicology Industrial Hygiene.

Q Who paid you to do that?

A I was compensated for doing that by the Norfolk and Southern Railroad.

Q And a part of their interest about this kind of alleged exposure?

A That's correct.

Q All right. You said there were two things.

A Yes. There is another study that I undertook more recently of an older locomotive because I had not done this particular procedure on the first series. And that was to ride an older locomotive—it happened to be one that was a turn of the century locomotive operated out of Grapevine, Texas. It's a coal fired locomotive converted to oil, so it's no longer burning coal. But I rode on that an excursion route for six and a half hours and measured the pattern of air flow through the cab and the theory behind my interest was that the furnace, the fire box has to gather its air supply from somewhere. There is a tremendous volume of air for every pound of fuel in one of these.

[44] And anybody that's ever seen a coal fired or even a log fire in a stove recognizes there is a tremendous rush of air through the door. All of this air basically comes from either directly in the center of the locomotive at the fire box level, or from underneath where the major damper is. And so, I over that six hour run measured the direction and velocity of air

using what is known as a hot wire anemometer to evaluate the probability of air going from the center back to the location where the engineer and firemen would reside. And at all times when I was able to test there was movement of air from the windows area where these gentlemen sat toward the center and down, or in some cases up, because there was also a vent. But at no time was there the reverse flow from the head of the boiler where there was or would have been in other years asbestos, toward these people.

So that if there would have been have been dust, it would have been moving toward and down.

Q Away from the men in the respirable area?

A That's exactly correct.

Q And who compensated you for that?

A No one.

[45] Q You did that on your own?

A Because of my interest in the issue, yes, sir.

Q All right, in your experience is there any basis for over exposure of asbestos given the ____ of riding on a steam engine?

A None whatsoever, sir.

Q There is allegation of asbestos from vibrations either in a locomotive or in a facility. Are you familiar with that type of allegation?

A Yes, I am.

Q Is there any basis in your experience for over exposure to asbestos from that?

A You just said the words over exposure.

Q Right. Over exposure.

A Certainly there may be exposures above background, but physiological meaningful exposures, exposures above those that even today would be considered important? No.

Q About this asbestos from sweeping floors in the 40s and 50s?

A There are several complicating factors there. Certainly there would have been dust on the [46] floor. Certainly there would have been dust on the floor. Certainly some of that dust, if it is as described, containing asbestos would have contained asbestos, but anyone who has ever been in a backshop or been in a roundhouse would know that floors often contain enormous amount of grease, oil, dirt and grime. There is tremendous absorption capacity of asbestos and even these other materials, these magnesium materials for oil. Asbestos fibers have been used for many, many years as an absorbant for greases and oils. And so those material would have had a tendency to coagulate, actually, with those other materials.

We don't know the levels, but certainly there would be some times when there would be clouds of dust. No question about it.

Q How about sawing asbestos, can that cause over exposure?

A It certainly can cause elevated levels for the duration of that sawing activity, no question about it.

Q How about applying and removing asbestos lagging in the backshop type of facility?

A There would be some dust during the [47] addition; there will be much more during removal. There is no question that during removal, especially, there will be elevated levels.

Q That is the time when in average, when we talk about TLV's and PEL's come into play, when you can have these incidents, as you've described of potential over exposure?

A Right. For a particular individual?

Q Yeah, for a particular person.

A Well, depending on how near he was to that particular activity, because certainly proximity played a big role. Concentration falls off very quickly as you can see from the dust that you raised there a few moments ago. You didn't

walk ten feet and yet there was no dust. And so, proximity constitutes a big thing there.

Certainly those things that are proximate to it and remain proximate to it have a greater opportunity for exposure than those from distance from it.

Q How about asbestos from pipes in a facility?

A There is little opportunity for that [48] material to be released. First and foremost the overwhelming majority of that, as we indicated earlier, was wrapped either in a canvas medium or in a metal medium. And often it was wrapped in a what's called a rooting cell, something to maintain the integrity of that over the course of time. And there was not—there is no evidence to support any other locations.

Testing, for instance, down in other shops parallel to railroad shop, there is no evidence to support elevated levels.

Q We've heard testimony from Mr. Butler about nonrailroad exposures to asbestos—for his 33 years of nonrailroad exposure to asbestos in other facilities, power plants and a variety of places?

You have knowledge about the potential for over exposure in places other than the railroad, is that correct?

A Well, yes, of course depending on what he might be doing.

Q Is there something about over exposure in the nonrailroad worker?

A Certainly, by his description he talks about working in a variety of locations. He talks about [49] schools and churches and the Celanese Corporation, and he talks about also being a contract employee working during construction and renovation of a variety power plants.

One of those power plants I have some significant information about and that's the John Amos power plant over here a ways. And in fact, that location for many years was

very heavily—how to use the word—there was a great deal of asbestos containing insulations on the various high temperature, high pressure streamlines within that location. And based on my review of the descriptions that he gave in his deposition he had ample opportunity for exposure—I don't know, I didn't take measurements, of course, but based on his description of his activities and his proximity to other people, he had ample opportunity.

Q How about transfer shed with packaged asbestos products? Is there a basis for over exposure there?

A Well, let's understand what a transfer shed is. It's an open building, each side has a track on it, it is built somewhere up above the surface so that the level will be level with the floor of the car. [50] So it's a long structure, a roofed structure with concrete, perhaps concrete base and you can enter a car on either side. So it's an open area first and foremost.

And we're talking about product now because if in fact a product just happens to be an asbestos containing product it doesn't necessarily mean it's gonna release fibers unless for some reason or another we broke it; and then there might be some fibers released. But you can't expect the great percentage of any product would be confined or they wouldn't ship it that way very long.

Q How about asbestos wicks and switch heaters; the basis for over exposure?

A Actually, that's pretty silly because the exposures there would be minimal. You're talking about a small woven material that over the course of most of the time is wetted with kerosene or something equivalent to it so that it wouldn't be available to release fibers into the atmosphere. And even under those circumstances where it might, it would be such a minimal thing as to not be measurable almost.

Q How about asbestos bands on Burrow [51] Cranes? Are you familiar with that allegation in this case?

A Yes, I am.

Q What about basis for over exposure there?

A Well, that's one area where I have investigated personally. I've had opportunity in other circumstances to actually test the bands on crane brakes, on a crawler track crane, for another company's interest. In fact we totally—we asked the operator of that crane to totally destroy, by operation, the brakes by running it and squealing the brakes until they were totally worn out and measuring the air borne concentrations at all times and then ask the mechanic to replace those brakes.

Q What did you determine?

A At no time were the asbestos fiber levels at his breathing zone ever elevated above the then acceptable levels of asbestos fibers for a work place.

Q Which you've tested, as described to the jury, and compared to what you've read in the depositions where that work activity was described, was it the same type of floor plan, same type of relation between the operator and the band, and so forth?

[52] A As it was there under written description, I wasn't here in the courtroom to hear it—

Q I know. But the sworn testimony that you've read would it appear generally, comparative to what you've described?

A Indeed it was, sir.

Q There are some allegations in this case about exposures to dust other than asbestos. I want to ask you, first of all, do you have knowledge through the credential that we've talked about, with respect to an understanding of exposures to sand and/or coal dust?

A Yes, sir.

Q You've read the allegations and sworn testimony with respect to those kinds of dust in this case, is that a fair statement?

A Yes, sir.

Q With respect to the allegation that exposure to locomotive sand from engine braking, I'm thinking of a yard setting—

A Yes, sir.

Q Are you familiar with that?

A Yes, sir.

[53] Q Any reasonable basis for over exposure?

A My presumption is that the gentleman ____ concerned is on the ground and the—

Q That's my understanding.

A —the engine is moving.

Q That's my understanding.

A Well, if the engine is moving, how can he be near it? I don't see how they can stay close to it for a very long period of time. And there is just not a great deal of opportunity to generate much very fine dust from very slow stops.

Q Well, very briefly for the jury, we've been going a long time so I want to get to the end. They need to understand, but they need to understand how did speed and sand dust—what's the relationship between them? And how is sand even used on trains?

A Well, sand in either the diesel bays or in the steam bays was used, as you can understand, the steel wheels on steel track and sometimes they need extra friction to initiate movement or to stop. And so they had containers that culminate into a funnel that culminated back into a tube that right above the track would release sand at the request of the engineer. And [54] that would be in front of each of the drive wheels or behind the drive wheels, depending on whether they're going frontwards or backwards.

And so, when he sensed that there would be slippage, he would put a little sand on the track. And if in fact, there was a great deal of energy of spinning the wheels, then you could break up that sand into very small particle and perhaps get

them small enough so that they would be acceptable for the respiratory tract. Generally, that dust is too large so it would never get into the respiratory cycle.

Q So, if you're going slower it doesn't crush it as fine?

A That's correct.

Q With respect to what you've understood from the sworn testimony about coal dust exposure in these cases, is there any evidence or anything for basis for assuming over exposure?

A No basis upon everything that I've reviewed in regard to this release of coal dust, although there are some very large—from a physiological perspective very large particles involved. There are very few that are fine enough to gain entry [55] into the respiratory tract.

Q Let me ask you some of your opinions about the allegations made by some of the plaintiffs and then I'll be done.

With respect to Freeman Ayers?

A Yes, sir.

Q You are familiar with his work history and exposure allegations from the materials you've been provided and what you've been told about this evidence, is that correct?

A Generally, I think, yes.

Q To a reasonable degree of scientific certainty did he have exposures on the railroad in excess of then existing threshold limit values?

A On a timely and average basis, no. There were a few times early in his career, '47 to '50, when he may have been in or near stripping, or somehow disposing of insulation. But when you consider one day a week for a very short interval of time, given everything else that he did, no, there was no reasonable expectation of him having excessive or physiological meaningful exposure to asbestos fibers.

Q Carl Butler. You're familiar to his work [56] history and exposure allegations in this case?

A I am.

Q To a reasonable degree of scientific certainty, did he have exposures on the railroad in excess of then existing threshold limit values?

A My understanding is that at some point he did some work in what might be called backshop or a shop where they were doing some repair and he had opportunity occasionally to be near asbestos containing insulation that was being removed. But his job would have required him to be in and away, in and away from this from some portion of the renovation of that unit.

So, when you look at it overall, using professional judgment, I wasn't there and I can only use what he said and what I understand, based on what he said, there is no reason to believe that that exposure would have caused him to have excessive levels of asbestos exposure. And certainly, after he got away from the railroad, it would not have been a railroad related asbestos exposure.

Q Doyle Johnson. You are familiar with his work history and exposure allegations in this case?

A Yes.

[57] Q Let me ask you to a reasonable degree of scientific certainty did he have exposures on the railroad in excess of then existing threshold limit values?

A There is no basis anywhere in my review of his work to support that he had reason to have physiologically meaningful levels of asbestos dust to produce disease based on his work on the railroad.

For the most part he worked maintenance of weigh outdoors, doing outdoor things, generally speaking. But while he had other disease processes there is no basis to conclude that he had an asbestos related—he would have had ____ to have an asbestos related disease based on the descriptions of his exposures that were provided in the record.

Q John Shirley. Are you familiar with his work history and exposure allegations?

A Yes, sir.

Q I may have failed to ask you about this, but there is an allegation he makes about asbestos walls and ceilings?

A That's indeed correct. He had a small cubicle, 10' by 12', or whatever.

[58] Q To a reasonable degree of scientific certainty or probability did he have exposures on the railroad in excess of the threshold limit values?

A There is no basis that on a time weighted average basis, that under time weighted average consideration that his exposure should have ever exceeded the concurrent, or the then responsible threshold limit values and he should not have had excessive exposures based on what was appreciated at that time.

Q James Spangler. You are familiar with his work history and exposure allegations?

A I am, sir.

Q To a reasonable degree of scientific certainty or probability did he have any exposures on the railroad in excess of any existing threshold limit values?

A Well, certainly there was an interval of time from '45 to '50 when he claims to have done some stripping of locomotives and work, and even when he was working as a pipefitter from time to time in '51 and '52, when for short intervals of time he might have had some levels in excess of what we would recommended at [59] this point in history. And then he did work '52 to '55 in the powerhouse where he claims to have removed and installed asbestos containing materials there.

And then in the Bluefield shops he apparently did some running repairs '55 to '59. So, over the course of time he would have had levels in excess of those that would be considered proper now, but certainly there is no basis to conclude from the levels acceptable at that time that he would

have been exposed to levels in excess of those that would have been acceptable.

Q Finally, that leaves Clifford Vance. Are you familiar with his work history and exposure allegations?

A Indeed I am.

Q To a reasonable degree of scientific probability did he have exposures on the railroad in excess of known existing threshold limit values?

A And my answer is, as I understand it, that early in his career that he was a laborer at the roundhouse in, how do you say it, Iaeger?

Q Iaeger.

A Iaeger. Okay. That was a fairly [60] operation as I recall from reading, there were only two stalls in that roundhouse, and he swept up residue from floors in that area, among other duties. And then from '45 to '60 and then from '67 to '81, or thereabout he acted as a hostler, or a person that moved trains about the yard at both Iaeger and Bluefield. Then he claims that, as I understand it, he moved units in and out of one or another of the buildings from time to time.

Based on everything that I have reviewed, there is no support that he would have had excessive levels of exposure, especially excessive levels in comparison to the then acceptable concentrations for the work place.

Q For all of these plaintiffs taken together, just to summarize what you've said, based on then existing threshold limit values, did any of them have over exposure on a time weighted average?

A Based on the concurrent available, acceptable evels, no.

MR. TURNER: Your Honor, if I could have a moment.

That's all I have at this time

THE COURT: We'll take a ten minute recess.

* * * *

TRIAL TRANSCRIPT
April 22, 1998

Weir Testimony

* * * *

[30] Okay. Thank you. Quick question about sand blasting. Would you agree that sand blasting, if you don't have any type of hood, or protection, can cause some immediate irritation?

A Yes, sir, it sure can.

Q I mean, it can cause—as opposed to asbestos, if you don't know it's dangerous, other than a little bit of aggravation, asbestos is something that can be worked around, in most environments with a lot of immediate irritation?

A Well, most of it is skin impact, for the most part.

Q As compared to sand blasting, is it something that's likely to cause some pretty immediate aggravation in terms of stuff hitting your face, that type of thing?

A Yes, sir.

Q All right. Let's talk, just very briefly about the individual cases and then you and I will be through.

A All right.

Q Mr. Shirley. Do you agree, he's testified here and I think in the deposition material [31] that you have, he talked about loading and unloading asbestos products?

A Yes. He talked about it in a transfer shed.

Q Do you remember and agree that the safety procedures the Alton railroad recommended in the 30s said that employees loading and unloading asbestos products should be protected?

A I don't remember that.

Q Could we just, briefly, take a look at this and put that on the screen. This is the January 18, 1937. Number one said, "Respirators should be furnished by the company and they should be worn at all times by employees handling asbestos. Attention is called to some of the specific instances where

respirators are required and when one is loading and unloading shipments of asbestos".

A Indeed, you're right.

Q Thank you. We talked a little bit, yesterday, about, I believe, the sand exposure that Mr. Shirley had when a locomotive would have stopped right beside him. He's testified that he'd be standing there and a locomotive is coming his way, and he's checking [32] the car and so he's writing down numbers as they come by—trying to—and I think he indicated that he wouldn't get any dust if the locomotive kept moving fast—

A No, he wouldn't get very much.

Q Is it your understanding, that what he's talking about is the locomotive going past him?

A That's what he said in his deposition.

Q He said, here—

A A deposition is sworn testimony. He swore to tell the truth, here, sir.

Q Well, he's sworn to tell the truth here, too.

A I have to go on what I have.

Q What he's talking about here, in this courtroom, was that sometimes a locomotive would stop right beside him when they poured the sand down into the (inaudible) system. That would be a different kind of exposure, if that's correct?

A Yes. Those are very large particles. It has no physiological effect.

Q But it would be very different from what you discussed here?

[33] A Yes, but it wouldn't imply a physiological response.

Q Well, the N & W had a claim for that type of exposure in the 50s; didn't they?

A I don't know.

Q The Virginian Railroad had a claim, do you recall, for a worker who was—I think it was the guy who was driving the locomotive said the sand came back up in there and

harmed him during the—was it during the 50s? Have you seen that claim?

A No, sir. I have no idea of that.

Q Okay. It's in evidence.

MR. BAKER: The question should be clarified, then, as to whether it was the same exposure about sand dumping beside somebody, or into the cab.

MR. RION: Oh, it was definitely into the cab, in the claim.

THE WITNESS: It was a totally different circumstance.

BY MR. RION:

Q You're saying the dust, though, the dust that came up would be large particles and wouldn't hurt anybody in the cab, or outside?

[34] A As he is running the sand into the hopper, that is correct. That material is very, very large and it wouldn't be effective as a friction material if it were too small.

Q That would be true of inside the cab or outside the cab?

A No, we're talking about material, that's correct.

Q I mean, if that's your opinion, your opinion would be the same for both the guy in the cab, or a guy right outside the cab?

A My opinion would be based on the facts as I understood them, and I don't understand these you are referring back to—

Q Well, it's in evidence that September 14, 1941—number 14. But, maybe I'm confused, but if you're saying the particles are too big to hurt anybody, they are gonna be too big inside or outside the cab; am I missing something?

A Sir, you're trying to put two separate elements that occurred in 1941, and whenever this gentleman makes his claim, separated by different circumstances, totally. I don't know those [35] circumstances. What you report to me was different from what I read in sworn testimony during depo-

sition that I took for the truth, and you're trying to tell me now that he said something different besides that.

Q Is the sworn testimony where you claim that he says that the locomotive did not stop beside him?

A He said it was stopping beside him and he was exposed—and it would be dusty for a few minutes. That's the way he said it, "they would be dusty for a few minutes".

Q Well, that's when the locomotive stopped.

A When it was stopping beside him.

Q Well, okay, then maybe we agree. I thought you said on direct that the locomotive was gonna pass him and not stop; didn't you?

A Well, the whole point of putting sand down is during stopping.

Q Right. Well, are you saying in his deposition he said the locomotive never stopped beside him?

A No, I didn't say that.

Q But then you say on direct exam when they [36] were asking you the question, he wouldn't get any exposure because the locomotive never stopped beside him?

A No, I never said that. You are again—

Q I misunderstood you. I thought that's what you said.

A I don't think so, sir.

Q You didn't say it?

A I think you're distorting it.

Q Mr. Johnson talked about, I think we can remember, that he looked at one of these photographs and was asked about working around steam locomotives and they asked him if was it as big as maybe as this picture or another one and he said he worked around what he called a 2100 and said that was bigger than some of the pictures we've been showing. I think everybody's notes would reflect that. That's what I'm—Do you know what a 2100 is?

A I don't know by number what the 2100 is.

Q And from what I read in Mr. Johnson's deposition he simply did not discuss steam locomotives in his deposition; right?

A I didn't find much of it.

[37] Q Did they ever ask him about that?

A I think they asked him if he had or if he was claiming any other exposure and he did not bring it up and I took him at his word when he said he didn't have any other exposure, sir.

Q Well, do you think if he said he worked in this courtroom that he worked around steam locomotives bigger than a 2100 that that's something that he's fabricating?

A No, I think he didn't tell the full story on his deposition, that's all.

Q And he wasn't specifically asked if he worked around steam locomotives?

A No, but he was asked for his exposure. "What other claims of exposure do you have, sir?"

Q He was never asked if he worked around steam locomotives?

A No, but he was asked, "What other areas of exposures do you have?"

Q Can you tell me what exposure he might have had when he remodeled the roundhouse and he took part in tearing down the roundhouse?

A That was an interesting thing because [38] they said it took four years to get that wooden floor outside of that house in Williamson. That seems like an extraordinary thing to take four years to take a floor out of a roundhouse.

Q Do you think—

A A wooden floor.

Q Do you think this is something Mr. Johnson's wrong about?

A No, it just seems like an extraordinary interval of time and I can't believe anyone's working period would take the floor out of a roundhouse, if indeed, the extensive time of

four years, any one interval of work exposure would not have produced significant exposure because of the spread out nature of the opportunity for exposure.

Q Do you know exactly how he was exposed?

A No, my understanding of the reading of it was that he was using a mechanical device to extract those timbers. So, it would have been a mechanical device.

Q He talked also about operating a Speno machine. Do you know anything about Speno machines?

A I understand that Speno is one [39] manufacturer of a variety of machines, but just the understanding that I have is that it is a ballast cleaner. Generally, ballast cleaner machines are used in yards. Perhaps it could have been used in other locations, to get debris like a foreign material that might be associated with a ballast, out and away from it.

But generally, it would have been used in the yard where there is a great deal more opportunity for this to be deposited.

Q Do you know anything about whether the Speno Company furnishes respirators with their machines?

A I have no idea.

Q Well, Mr. Johnson testified they did, but that they didn't last for so long and that after the respirator ran out the railroad never furnished respirators to the men doing the work? Do you have any opinion one way or the other about that?

A No.

Q Okay. Would you agree that Mr. Ayers, probably at sometime, worked around asbestos processes where there was some visible dust created from steam locomotives?

[40] A Yes, sir, during '47 to '50, three or four times a month he worked in the area where there would have been stripping and mixing and installing and disposing of insulation.

Q And Mr. Vance, when he worked with mixing dry asbestos with water, at some time some of that would have created some visible dust in the air?

A It doesn't make a great deal of sense that he would have had too much of this because as I understand the Iaeger, they only had two stalls and it wasn't a very big operation; it couldn't have been a very big operation.

Q But would you still agree that mixing dry asbestos with water will create some dust until it's wet?

A Yes, sir, no question.

Q And he also had some exposure while cleaning up asbestos?

A That's what he said.

Q And, although some of the particles—obviously, if the floor is greasy may stick to the floor?

A Yes, sir.

[41] Q If you use a broom in cleaning up dry asbestos there is going to be some dust created and I think you've said that?

A No question.

Q Now Mr. Butler had a lot of asbestos exposure outside the railroad?

A Thirty-three years.

Q And he had, according to his testimony, three months of exposure on the railroad. Does that sound reasonably accurate to you?

A Yes. The understanding I have is two or three months, yes.

Q And he worked for the railroad for how many years?

A I don't remember.

Q A lot.

A He worked in and out and around, but he only claimed three months of exposure.

Q He worked for several years—

A Yes, he did.

Q And yet he's been honest enough—

MR. ADKINS: The record reflects that he worked twenty-three months.

[42] BY MR. RION:

Q Well, he worked for two years but he said that he only had two or three months of exposure, and that sounds like a reasonable claim, doesn't it?

A I don't know what's reasonable. I'm sure—

Q Well, it doesn't sound like an exaggeration if he worked there two years and said it's two or three months of exposure.

A I don't know.

Q All right. And he had some exposure with the railroad to visible amounts of airborne dust that would have included some asbestos?

A That's what he stated.

Q And you're not in a position to say that the railroad exposure failed to contribute even slightly to whatever problem somebody might determine he has?

A I don't—I have no basis to conclude that such exposure should produce any effect.

Q Well, you're not a medical doctor?

A No, but I'm a research scientist working in the physiology of disease.

Q Well, the question that we're gonna have [43] here is not whether it caused an effect itself, it's whether—I'm gonna ask you to assume that whether their exposure at the railroad contributed, even slightly, to a disease process. Now, first of all, you're not even qualified medically to answer that question, are you?

MR. ADKINS: Well, then why are we wasting our time in asking it if he's not qualified to answer it?

MR. RION: I want to clarify that he's not stating the railroad's exposure failed to contribute to his—and I think you agree with me you are not qualified to state one way or

the other whether that exposure contributed even slightly to whatever disease someone else may determine Mr. Butler might have.

A You're absolutely wrong, sir. I'm a medical scientist, I work in pulmonary disease work, I've spent my entire career working in inhalation toxicology trying to develop the mechanism of destruction of a variety of material, including particulate material.

The literature is replete that the minimal exposures that he would have gotten earlier in his [44] career would have all dissipated because, if you look at the (inaudible) reports, he is replete with the fact that there would be no residual from that many years, thereafter.

The dates are all there, they are very clear, there is no confounding of them, they are as close to absolute as you can get.

Q Now, if you look at—many authors believe the older exposures are more important, don't they?

A Why, if they reach a threshold, that's correct.

Q You've testified about this before, haven't you?

A Testified about what? What page were you referring to, sir?

Q And you testified about the model?

A I don't think so, but perhaps if you have the data we can talk about it. I don't recall.

Q Isn't there a model of asbestos disease that says the older exposure, the more important?

A It can reach a threshold, that's true. [45] But there is no basis to conclude that he's ever reached a threshold. That's the whole nature of it, sir.

Q Just so we're clear, there is a model of contributing causation for asbestos diseases that says the older exposures are more important?

A You're doing the testifying—

Q Is that correct?

A I don't have those data in front of me. If you do, bring them.

Q Do you know who Dr. Gall is?

A Yes.

Q And you know who Julian ____ is?

A Yes.

Q Do you know whether they have developed a model for attributing causation in asbestos disease that emphasize the overexposure? I'm asking you, do you know one way or another?

A If they do, or if they don't, we ought to have it in front of us if we're gonna talk about it.

THE COURT: You can answer that question.

THE WITNESS: I don't remember enough about it to talk about it at this point.

BY MR. RION:

[46] Q All I'm asking—do you remember generally, if they have developed a model for attributing causation in asbestos disease?

A I know that they wrote many things. Without the original papers here, I don't want to discuss it further because I feel that I might misrepresent it.

Q Do you remember whether the model stated that the older exposures are more important?

A I don't remember the facts of that, no, sir.

Q Have you ever testified in a case that the older exposures are more important in attributing causation?

A I don't know, sir. You're the one who has all my testimony.

Q You're the one who's been there. I'm just asking you.

A I don't think so.

Q Now, Mr. Spangler, we talked about yesterday a little bit. Do you recall that?

A I recall he was mentioned, yes, sir.

Q Now, their steam lines—steam boilers, [47] and powerhouses and lines carrying, piping systems from boilers and powerhouses have been in the railroad shops in the 60s and 70s?

A Yes, sir.

Q And many of those boilers and powerhouses and steam lines had to be insulated with something?

A They probably already were by that time.

Q With asbestos?

A Yes, sir.

Q And there were workers who sometimes had to repair those steam lines; correct?

A Yes.

Q And Mr. Spangler was one of those workers?

A That's the understanding that he gives, yeah.

Q And it's your understanding, is it not, that throughout the 1970s the N & W had—forget the 50s and 60s, throughout the 70s had no program for controlling asbestos with regard to workers who had to repair asbestos steam lines.

A They didn't have a general overall program, that's correct.

[48] Q And that was even after the passage of OSHA, which had federally mandated requirements?

A At that time they controlled the levels of exposure, not from there—to deal with it. It was later that they did that.

MR. RION: That's all we have.

REDIRECT EXAMINATION

BY MR. BAKER:

Q Dr. Weir, by my count we're over five hours, so I know that we're all ready to move on to other things. But just a couple of points I want to make, or ask you about.

I'm not sure that I understand where we left off or where we ended up with this idea about what five million particles

per cubic meant. It was your testimony yesterday about that being the TLV set by the ACGIH. The jury will recall from their own exhibits what we were talking about.

Dr. Garrett Skeepers, in testimony to this jury by videotape—what did Dr. Skeepers say in 1964 about what five million particles per cubic foot—don't read all of that—just, as you recall, what was that? Was it total dust, or was it asbestos dust?

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TRIAL TRANSCRIPT
April 22, 1998

Renn Testimony

* * * *

[89] that you've done. I'd like to move on if we could—I think you have a model. I'd like for you to explain to the jury, using the model, how the lungs work, and the pulmonary function of the lungs.

Your Honor, may the members of the jury move down, if they wish?

THE COURT: They may. If they wish.

THE WITNESS: (Indicating) The lungs are actually an organ to take, or let's say extract oxygen from the air and move it into the bloodstream, where the bloodstream can then take it, much like a trolley car line or streetcar line, railroad line, through the tubes—I guess it would be best to say subways, through the tubes, the blood vessels, and carry it to whatever organs need the oxygen in order to do their work.

And, of course, the organs that do the most work, organ system that does the most work is the muscles. They support us, keep us moving and allow us to do whatever we want to do. So they use the most oxygen. But. the heart, which has to beat all the time, is a muscle, and it needs oxygen. And if it doesn't get oxygen, we have a heart attack. It's very simple. So all the lungs are is to actually bring in air, move that [90] air through a place where the oxygen can get into the bloodstream. And it does that by this muscle, which is the diaphragm, which separates the chest from all the other organs, stomach, liver, and all the intestines down below, in the abdomen.

And whenever we take in a deep breath, this muscle moves down and pushes down the organs that you have below. What that does is create a vacuum, or absence of air in the windpipe, which is this little striped device here (indicating), little

grayish-blue, white blue and white stripped device here, the windpipe which goes down through your neck. And then the pressure of the air pushes it into your lungs. This is why we breathe, or how we can breathe, because the barometric pressure pushes the air into your lungs. For instance, when you take a straw and you suck a liquid out of a glass, water, Coke, whatever, what you're really doing is you're sucking the air out of a straw, and then the pressure pushes the liquid up through the straw. You don't actually suck the liquid up, you just take the air away from the straw, and then, the pressure, the barometric pressure pushes it up. This is why when you see the pictures of the space—the men [91] who are traveling in space, or go to the space station, and if they put a liquid out there, it just floats around. It's not gonna do anything.

They also have to have pressure in that cabin in order to push air into their lungs because there is no pressure in space and the higher you go up, the less pressure there is and the more difficult it is to breathe, so we can't breathe in space without pressurized suits.

And my first introduction to that concept was actually in the Navy, at the School of Aerospace Medicine because of the pilots that go up above 12,000 feet then you have to have pressurized breathing.

The air goes in (indicating), it goes through these tubes, the bronchial tubes, it goes out into both lungs, and if you look at the bronchial tube, and this is just a very small representation.

But what happens is, it's sort of like an inverted tree. If you think of a trachea or a windpipe as being the trunk of the tree, and you actually turn this upside down, then what you have is a tree with branching. It branches and branches, and rebranches until it gets out to the very tiniest little branches. [92] And that's exactly what happens in the lungs, in the respiratory system.

And then it gets out to the little teeny tiny air spaces which are represented by this pink. It's like a sponge, like a little kitchen sponge, not the sea sponge with the big holes in it. The sea sponges with the big holes in it are sort of like a person with emphysema. Those are the big holes that you see in a person's lungs with emphysema. But in a kitchen sponge there are some little tiny holes, that's somewhat like the lung which has all the little teeny tiny holes in it.

Now, in this you see some grayish larger areas, grayish-blue, some creamlike areas and some areas which are pink, but larger. And what those are, are areas where the blood vessels, the artery and the vein, and the bronchial tube have been cut across. So where you see these (indicating), this could represent the pulmonary artery which carries the blood from the right side of the heart, out into the lungs, to pick up oxygen, and then the pulmonary vein which carries the oxygen back to the left side of the heart so the heart can pump it; pump the blood and oxygen out to the rest [93] of the body.

And so, when you cut the lung, this way, when you slice across it, you're actually slicing across these tubes, because they run out through the lung tissue.

Well, what is the reason for this set-up in the lungs so that we can breathe, and the ultimate purpose in breathing is just to get oxygen to where it needs to go. That's the whole bottom line of breathing.

And the purpose of the respiratory system, the way it's set-up, anatomically, or the reason the anatomy is the way it is, is because you have to get to a place where the oxygen will get into the bloodstream very quickly, very quickly. The way the heart pumps, and the way that the anatomy is, it is set-up so that there's only three quarters of a second for oxygen to get from the lungs into the bloodstream; and so it requires a very efficient mechanism.

Now, the air spaces that are like this sponge, the kitchen sponge that I've talked about—if we take one of those air spaces—I guess I can use this board. If we take just one air space and represent it as just one little open air space, where air would go [94] in and carry oxygen into that space.

Q Is that an alveoli?

A Yes. That would be called an alveolus. And if we have one blood vessel that surrounds it, what we really have is two very thin areas, little tissue-like areas, or cells. And actually, if we looked at this under the microscope, there would be little thin cells that represented both sides of this, but they're only one cell, one small cell apart. You have to see it under a microscope in order to know that.

In three quarters of a second the oxygen has to go across here and the waste from your metabolism, or whatever, has to go in here to then be breathed out and gotten rid of, pour carbon dioxide back into the air for plants to use, so that they can actually give us back oxygen again.

And I liken this alveolus to the leaf of the tree. That's when all the respiration occurs in a tree, and so, since we've likened the lung here to an inverted tree, the alveolus would be the same of the tree, or the leaf of the tree, where respiration really occurs with the transfer of the oxygen and the carbon dioxide. And it's just the opposite in the plant world.

[95] Q In looking at this portion of the model you've been talking about, you've said that these multicolor areas, the blues and the grays represent blood vessels?

A Blood vessels and bronchial tubes. Actually, it's not shown in this model because this model is not detailed enough to show this, but there is another, yet another system that feeds the bronchial tube. In addition to it receiving the pulmonary artery and the pulmonary vein, it also receives what's called bronchial arteries, and the bronchial arteries keep the bronchial tubes alive and they stretch out as far as

almost the end of a bronchial tube, but not quite. In other words, this is one of the few areas of the body that has a double blood supply, so that it's more difficult for it to die if something happens with its blood supply in one of those areas.

Q What happens if you have a complete blockage of one of the arteries that are entering?

A If you have a complete block, the bronchial tube will stay alive down to the areas where you start to have the alveoli, and where you have the alveoli is fed by the bronchial arteries. Excuse me, [96] it's the other way around. The bronchial arteries will keep it alive until you get down to where the alveoli are, and then, after that, it's depending upon the circulation from the pulmonary artery.

If the pulmonary artery is blocked, then it will die, that part of the lung will die after the bronchial arteries die. So, it's the far part of the lung that dies.

Q It would be in the lower portion of the lung?

A Well, no, it's to the outside. It could occur anywhere to the outside of the lung, you know, to the far side.

Q What kinds of things cause a blockage of the pulmonary artery?

A Well, these are known as pulmonary emboli, or pulmonary—sometimes it's known as pulmonary infarction if there is actually death of the lung tissue. And that means that the lung tissue, the infarction part died, just like a myocardial infarction, when part of the heart muscle dies. And what causes that is inactivity.

For instance, we have to be extremely [97] careful in the hospital. If we put somebody in the hospital, we actually have to anticoagulate them, use other methods to keep blood clots from forming. Most often they form down in the legs.

Orthopedic surgeons are plagued with this because they cast people's broken legs, and when they cast the broken leg,

the person can't move it and the heart that pumps the blood throughout arteries to all our organs is what pumps the blood through our arterial system, but the veins that bring the blood back to the heart, they have no heart to pump back to this heart that's in our chest. So the heart is really the movement of the muscle, but it's the walking about, the squeezing of the veins by the muscle that surrounds them, that actually pumps the blood back up through the veins.

The arteries that the blood is pumped into by this heart have no valves in them, but in the veins that are in your leg, they have valves that have flaps this way (indicating) so that when you take a step, blood is pumped up here, but it can't go back because of this valve. When you take another step, blood is pumped up here, but it can't go back because of [98] this valve, and the same thing here. But it can't go back because of this valve; and so on, until it gets completely back into the heart. In those veins, if there is inactivity, then the blood doesn't move, and when the blood doesn't move, it'll clot; and when it clots, eventually, when you do start to move, or even before you start to move, clots form what's called a tail. And if that breaks off then it will travel up through the right side of the heart, and then it has nowhere else to go except a straight shot into the lungs. And the lungs are like a sieve, or a kitchen colander and they catch those clots because they're too big, the clots are too big to pass through the lungs. And so, they catch those clots and that causes a lot of things, it causes pain, difficult breathing. It causes, most often, death of the lung tissue.

Q After we've talked about how the lung works, and its function, in a layman's term, is the lung an air pump to the body?

A Yes.

Q It's a pump to get air from the outside into the bloodstream?

A Yes.

[99] Q How do you measure how well a person's lungs work?

A Well, that's done by a number of tests. There are, basically, three tests that are used. There is a test to measure how much air comes into the lungs and how much air goes out and how quickly it goes out, and this is basically referred to as spirometry. And then there is a test where we can measure in different ways, the total amount of air that's in your lungs because spirometry will only measure the amount that a person can breathe out, or breathe in. But the lungs don't collapse like a balloon every time we breathe out, they stay stuck up against the chest wall. So even though you completely breathe out and pull your chest as tight as you can to collapse it, you still can't collapse your lungs. They still are stuck up there a little bit and there is still air in there.

Q So, is the remaining air the residual volume?

A That remaining air is called the residual volume, or abbreviated RV. And in that way we can measure the total lung capacity which is abbreviated TLC. And when we measure the total lung capacity, that [100] is the gold standard for determining whether or not there is a restriction to breathing, or a restrictive ventilatory impairment.

The third test is the test of diffusion, and diffusion is really what we're talking about here; diffusion of oxygen into the bloodstream. And that is a test we can do to indirectly measure that. There is also a test we can do to directly measure that.

Q Do you have a short video that shows the jury members what it's like for someone to give a breathing test, or a pulmonary function test?

A Yes.

(Whereupon, a video tape demonstration was shown.)

THE COURT: Do you want me to turn the lights down?

MR. BAKER: Yes. If you would, please.

BY MR. BAKER:

Q Dr. Renn, where was this video made?

A At my office. This person on the right (indicating) is one of my pulmonary specialists.

Now, I want to show you what you're going to see here. What you're going to see next is him [101] performing the test, the spirometry test. And then it will be repeated and then you'll see the way the different types of graphs and tracings are formed. He will be exactly the same, he will be doing exactly the same when you are just watching him perform the test, and what sort of breathing is required for the breathing test itself.

Just before this my daughter and my son-in-law had a complaint as to who was gonna be the videographer, and who was gonna be the subject in front of the camera; and you can see who won.

Now, if you look at the—there are two different types of graph tracings that are formed from the same breath, but this one is a measurement of volume and this is time. This one is different. This one is a measure of volume on this axis and this is a measure of flow; time is not really involved here. Now, you can put a timed tracing on here, but—this is volume and this is also flow. So, you actually have both of them because they help you with interpreting the different tests, and it tells you slightly different things, but the same thing about the breathing. Now, as you heard him say, breathe in, breathe out and that forms this [102] little up and down "W" shaped thing here. It forms this little circle here, and when he took in a deep breath, comes back here to the maximum volume. Same thing here, to the maximum volume, or the total lung capacity that he had. And then when he breathed out, he breathed all the way out, same thing and then this is the big deep breath in, and the big deep breath which should come back pretty close to where he was before. And

this is the forced vital capacity, or FVC. From this there are a lot of numbers taken. You've perhaps thought about the FEV1, which is the forced expiratory volume in one second. That's really taken from here, by looking at the time, seeing where one second is, and then what volume this is from that particular thing. Forced vital capacity is from here to here. This vertical line is in the computerized software for the American Thoracic Society guidelines for valid tests. It tells you that they breathe out long enough to meet those criteria for a valid test, or a good test. If you don't do the test well, it won't be accurate, and when you have a garbage test, you make garbage decisions. So you need good tests to make good decisions.

And this just shows you the same thing, except [103] instead of being inverted it's put upright, because that's the way it appears on most of the printouts that come out on the printer itself, instead of that inverted position.

Q You have to have three trials that are within a certain percentage of each other to get accurate results; is that right?

A That's correct. Well, actually you need three trials, but by the American Thoracic Society standards, you go up to eight trials in order to try to get those three.

Q So you have to have three that are within ten percent of each other on certain tests?

A Well, those are the old criteria, now it's within 200 milliliters.

Q But you can do as many as eight different trials to get three that are within the guidelines.

A That's right, but you don't go beyond right, because otherwise you wear the person out.

Q You touched briefly a moment ago—Doctor, you've shown us how the lung works and you've shown us how you test how well the lung is working. This is a pulmonary function test result from Mr. [104] Butler. Would you explain to the jury what the most important of these tests measures

and how it measures it, and what you can tell from these individual measures?

A Computers are wonderful devices. They can spit out more numbers than you and I could ever look at in a lifetime, and so there are a lot of numbers here and they mean something, but they don't mean all that much.

The American Thoracic Society in 1991 published an official statement on interpretation of pulmonary function testing, and in that statement, there was the criteria set up for how to interpret pulmonary function tests, basically only the spirometry was interpreted. And what you are really looking for first is this, and this is the ratio, the FEV1/FVC ratio, which just means that you take the FEV1 and divide it by the forced vital capacity.

Q Doctor, what is the FEV1?

A That is the forced expiratory volume in one second. And the FVC is the forced vital capacity which we just looked at on the video.

If this number, and actually you multiply [105] this number by a hundred to get percent. Whatever the result is you multiply by a hundred; that equals a percent.

This percent varies according to the age of the person, and it depends upon what predicted values you're using as to what percent is normal, and so forth. There must be eight or ten or even more different sets of predicted values in the United States. Throughout the world there is even more. So it varies according to the age of the person.

The percent then, this would be the predicted for that person, based upon their age, their sex, their height, etc. And then you have a lower limit of normal for them. Not everybody is 74%. You have tall people, poor people, etc., and you have people that—it varies. It's sort of like a curve of people.

If this number that comes from the person is normal or above normal, then what you do is you say that the test is likely normal. In other words, there is obstruction. You also look at, if it is normal, or near normal. Then next, is this test consistent with any restriction? Because that's all a pulmonary function test does. It doesn't make a diagnosis.

[106] It will tell you if there is obstruction or a restriction to breathing. And if this normal or above normal, then you look to the FVC and see whether or not it is below the lower limit of normal. And if it is you have a restrictive ventilatory defect. And so we look here; (indicating) it's normal. It's above the lower limit of normal. We look at it and see that it is 3.69, which is above the lower limit of normal of 2.79, so we do not have a restrictive ventilatory defect.

Q Doctor, when you say a restrictive, versus an obstructive ventilatory defect, will you explain that to the jury, what's meant by a restrictive versus obstructive defect?

A Yes. In the time versus volume curve, that we just looked at on the video, a restrictive defect will look like this. A person will take in a deep breath, blast it out, and it will look normal, but it will be reduced in size. In other words, this volume will be reduced; FVC is down. But if you look at the flow volume loop, it will look normal, but it will be very small. It will not be the normal size that you will expect.

If you have an obstructive defect, then [107] when the person breathes out, they just keep on breathing out. They don't come up to a nice flat place. And in the flow volume loop, it'll come up and drop off and then taper out and then come back.

Q In simple terms, does having a restricted disease mean that you can't get air into your lungs, while obstructive disease means that you can get it in, but you just have trouble getting it out?

A That's correct.

Q Are there any other tests, that you look at in making a determination of whether or not you have restrictive or obstructive impairment?

A Yes. The gold standard test for determining whether there is any restrictive disease, is to determine lung volume study, due to lung volumes. This can be done by different methods.

But what you're really looking for is that amount of air that stays in the lungs when you breathe out completely, called the residual volume, or RV. And then you know what the air is that you can breathe out when you have taken in the deepest breath and then breathe it all out. That's the FVC, or vital capacity, and you take the vital capacity and add it to [108] the RV and that will equal the total lung capacity.

And so the total lung capacity is the gold standard for determining whether or not there is a restrictive defect, and that was also stated in the American Thoracic Society 1991 statement.

Q Doctor, when you look at these values, and you have a predicted value, and a best value, and I notice a percent of predicted—I'm looking at the FVC. It's 94%. That means that his best was 94% of predicted; is that right?

A Yes.

Q Is that within what you consider a normal range?

A Yes.

Q What is a normal range from predicted? Your predicted is 3.91. How do you judge what's normal?

A Well, there are a number of different prediction equations that are used all throughout the world, and it's just what's been determined by different doctors. There is Morris and Gardner, there's Crapo and Morris, there's Knutson, there's Corey, there are all sorts of predictive standards that are used. And it depends upon each laboratory as to what each clinical [109] laboratory decides that they are going to use.

Several years ago, a survey was taken by one of the—well, it was the American College of Chest Physicians and was published in the journal, Chest. That survey lists a whole host of different institutions that use—who do pulmonary function testing. When I'm talking about institutions, they are mainly academic, or teaching institutions, teaching medical students.

And they asked them what they use and the way that it turned out was that they used prediction equations that came with the software that came with the computer that came with their pulmonary function test machine. So they didn't pick one, they just took whatever the company gave them that sold them the machine to begin with, which is not a good way to pick your prediction equations. It is not the recommended way.

These—for instance--in Mr. Butler, is sixty-six years old. In all the prediction equations that we've had throughout the United States, Knutson, Crapo & Morris, and so forth, they have made an assumption, which is really a misassumption, and this misassumption was that older people—everything [110] deteriorates with age. We all accept that. Everything goes with age.

And so, the older people they assumed that would deteriorate, their lung function would deteriorate at the same rate of this younger age group. And they took an age group of 25-65, tested them and found out that their lung function went down, let's say this rate or it's called the linear rate. But there is a national health survey study that's being done throughout the United States, testing a lot of things: nutrition, lung function testing, cholesterol, heart health, etc.

And so we have a lot of lung function information, now, on people who are older, because Crapo and Morris, and Gardner and Knutson, and all those people, really only tested a small number of people. They had very few people—they had very few people who were over the age of 65, so they

really didn't know whether their lung function went down after the age of 65 at the same, rate, the same linear rate.

And what was found is that it didn't. It actually deteriorated a little bit faster, and that was published by a person participating, well, him and other [111] people, a person named Enwright, and some other authors, they published what happens after age 54. And so, they published those standards. They also published the lower limit of normal for these in that age group, and so we apply those to everyone who is 65 or older because they are more accurate than anything else that you could give us.

The other thing about Enwright and group, is that their study was done on thousands of people, whereas Crapo and Morris, and Knutson, and so forth, theirs were done on a few hundred people. So we have a much better idea after the age of 65 than those literally thousands of people who were studied.

Q Do you have anything else you would like to add regarding what each of those tests mean?

A No.

Q We talked about the predicted normals a moment ago and how you had deduced the set that you would use. Did you do any testing, or was there any recommendation that you do any testing that the predicted normals that you decided to use in your office were consistent with the population of people that you were testing?

[112] A Yes.

Q What brought about that investigation and that test?

A Well, there were several articles that appeared in the scientific literature of actually one written by Dr. Crapo, himself, where the American Thoracic Society took up the question. And what was recommended is that each laboratory that was gonna do testing, studied fifteen people of both sexes, fifteen of male sex and fifteen of female sex, and that they span all generations that you might be testing in your

laboratory; and that these should be people who were not overweight, who were life long nonsmokers, who had not been occupationally exposed to something from which they might develop a respiratory problem and that they had no respiratory disease, or history of respiratory disease, and so we actually did that.

We tested almost fifty people and at the same time that I was doing the test, a colleague of mine, Dr. Lapp, at the West Virginia University was also doing the test. And so, together, we tested nearly a hundred people to derive the prediction equations, or get as close to the prediction equations that would best [113] fit the population that we test in the area up around Morgantown.

Q Would the predicted values that best fit the population tested in Morgantown carry over to the people you have tested in this case?

A Yes. Because what we're talking about is not a restricted area of maybe ten miles, we're talking about a very large area of hundreds of miles, that it would apply to.

For instance, the testing that Knutson—on the Knutson standards, that were done in Arizona, Tucson, Arizona. The testing that Crapo did was done in Salt Lake City, Utah. Vastly different areas and altitudes. The testing that Marrs did, I believe was done up in Minnesota. Some of the tests for the prediction equations have been done over in Italy.

Q But you have no reason to believe that the predicted values that you use wouldn't be applicable to someone from southern West Virginia?

A No.

Q Another test that was performed as part of your evaluation is a single breath diffusing capacity for carbon monoxide; is that correct?

[114] A Yes.

Q Is there also a predicted value for that test?

A Yes.

Q How did you arrive at the predicted value to use for single breath diffusing capacity?

A Well, it was the same way. We tested the—we not only did spirometry on all these people, we also did diffusing capacity studies on them and arrived at the prediction equations in that way.

Q We have seen some results of diffusing capacity tests that appeared to be below the normal standards, but when corrected for alveolar volume, they corrected for normal. Is that a procedure, or test that you do as part of your examination?

A Yes.

Q Why is it important to correct for alveolar volume?

A It's important to correct because if you have a loss of lung for some reason, since you're comparing this against normal predicteds, you're comparing this against people who have had no loss of lung. So if you have no loss of lung tissue, it's not [115] there to say, let's say, get in the game of being tested. And because it's not there, the test will appear to show that there is a decrease in diffusion.

And so you have to correct it, or you have to know how much lung is there. And the best way that I can make an analogy to that is, if you've got two football teams that are playing each other and they've got no spectators, nobody came to watch them play. They must be pretty bad since nobody came to watch them play. But anyway, nobody came to watch them play, but the score is published in the paper the next day. The score is fifty to nothing.

Well, one team had eleven players, and on the other team only eight showed up to play; and naturally, you had a lopsided score. Nobody was there to know that there were only eight players. Now, if somebody had been there to say,

well, the team with eight players really showed up and did pretty well.

And that's the same way it is for diffusion capacity corrected for the alveolar volume. The alveolar volume is telling you that we know how many players were there, and so the diffusing capacity has to be corrected for the alveolar volume, or it's not [116] accurate. In fact, many doctors don't even look at the diffusion capacity itself. They look only at the diffusion capacity corrected for the alveolar volume to see whether or not diffusion is normal.

Now, actually, diffusion capacity itself is a very good thing to look at because it is the very earliest sign you can have if a person has had some lung destruction, most often emphysema that hasn't shown up yet in some other way.

Q Doctor, in a person with asbestosis, will their diffusing capacity, corrected for alveolar volume, correct to normal levels?

A No. It will not.

Q Is that in most cases, or is that in every case?

A That's in 99 percent of the cases, that's in the vast majority, so vast a majority that it's likely not to occur except as a very rarity.

Q Doctor, we mentioned earlier your qualification as a NIOSH certified B-reader. I'm not sure how in-depth we went into the training to attain that certification, so I'd like to take just a moment of your time to talk about that with you.

[117] You said, I believe, you were first certified as a B-reader in 1981?

A Yes.

Q What type of training, on top of your medical school education did you undertake in preparation for taking the NIOSH B-reader examination?

A Well, as a medical student you're exposed to reading of all types of X-rays. As a resident in internal medicine,

you're also exposed to how to read all types of X-rays. As a pulmonary fellow—the two years of doing that, you concentrate only on reading chest X-rays, CAT scans of the chest, MRI's in the chest, other types of tomograms and studies of the chest. And so, all throughout your pulmonary training, you have to study intensely how to look at the X-ray.

In fact, one of the textbooks that I have states that you haven't examined the patient with a chest problem until you've looked at the X-ray. And you can imagine—you've been poked and prodded by a doctor, I'm sure, most of you have, and your abdomen is soft, your belly is soft and your muscles are thickened and poked and prodded, and so forth, but the chest can't because it had this rib cage all around it. So you [118] can't poke and prod the lungs and the heart and so forth.

There's no way to do that, so the only way for the doctor to look inside, other than using his eyes to see how the chest moves, his hands to feel for any abnormal feelings that there can be such as rubs, or friction rubs from pleural disease or pleurisy, or thumping on the chest to listen to how sounds—does it sound the right way? And listening with a stethoscope. Other than that, the only thing the doctor can do is look at the X-rays.

And so, the pulmonary doctor has to spend a lot of time just studying X-rays of the chest of different types. But in your pulmonary training, we're not taught to look at X-rays to see whether or not there is coal dust disease, or sand dust disease, or asbestos disease, or anything like that. It might come up occasionally, but that's about it.

The B-reader course is to teach you how to do this. If you will, it's like code that's used to classify these X-rays. And a person that is familiar with the code, sort of like a secret society, can fill out this sheet and it can be sent around the world to a [119] doctor over in Australia and he could look at

this and if he's familiar with the code, he can imagine in his mind what that X-ray would have looked like.

It is so difficult to learn to read these X-rays, and to actually, say, pass that test to become a certified B-reader, it's a six-hour examination, and you've got to go through an X-ray every four minutes during that examination.

And so, it's a really rigorous test. And when I took it, there were as many as half the people who took it at that time who failed the test and did not pass. I believe it's a little better now, that it might be up somewhere between fifty and sixty percent that might pass it. But I don't think it's much better, because it's such a difficult system to not only learn, but to do in a practical way, and that is actually to read the chest X-rays.

Now, during the test, you don't just read X-rays for dust disease, you read for whether or not the quality of the film—you're able to read the film. There are some films you just can't read. They are just too bad. And like I said, garbage tests will get you garbage results, so you have to toss out those films. [120] You'll say they can't be read. You have to know which films to toss out, you have to know other diseases that are on the X-ray. You have to know tuberculosis and cancer and heart disease and some other things that you find on the X-rays besides dust disease that are caused from an occupation or exposure.

And because it is such a difficult test, the only requirement that there is is that you attend a three-day seminar which is jointly sponsored by the American College of X-ray and the National Institutes of Occupational Safety and Health. If you attend that three-day seminar, then you can take the test.

Well, I don't know how anybody that can attend that three-day seminar and then pass the test. And so, I studied under one of the people who actually helped to teach the B-reader course, that's Dr. LeRoy Lapp at the university. I studied

under him a year before I even took the three-day seminar. At the end of that year, then I took the seminar and then took the test and passed it.

Q You did pass that the first time you took it?

A Yes.

[121] Q Doctor, could you teach me, or could you put up X-rays today on a view box and teach me to be a B-reader today?

A Not today, I couldn't. If I had enough time I could teach you to read, but it would take weeks, months, the amount of time that I spent with a medical background to read these tests, to read these X-rays.

Q Is there any way that you can set up a view box today, with X-rays, and teach the jury to look for those things that a B-reader would look for in making a diagnosis for asbestosis or dust-related disease?

A I could show the jury, but I can't teach them in a few minutes, to actually look at an X-ray and actually pick out, out of all those shadows what is considered a shadow consistent with a pneumoconiosis, or asbestosis.

Q Could you teach us enough just to be able to distinguish these arteries? Could you show us enough that I could distinguish that without your guidance?

A No.

Q Do you think there are any B-readers, or any teachers of the B-reading class who could come in [122] and teach the jury those things in five minutes or ten minutes?

A No.

Q You've talked about what's involved in doing a B-reading of an X-ray. What I have is, I think, the ILO form that you completed for Mr. John Shirley. If you will just explain some of the things that are on an ILO form for the jury, step down and do that if you'd like; just the different categories where you would indicate certain findings.

A Well, as I said, this is a code system, so all it is a marking from the different areas that then tell someone else

who just looks at the sheet what you were really looking at, when you're looking at the X-ray itself. First, you have to look at the quality of the film and decide whether or not you can actually read it for pneumoconiosis. Now, you might be able to read it for other diseases, but you can't read it for pneumoconiosis, then you should not. And you have to grade it as film quality one, two or three; three being the worst. But if it's not readable for pneumoconiosis, then it's U/R, which is unreadable. I mean, you would not go beyond that. And if you have anything other than [123] film quality one, you are supposed to state why it's like that.

Q What reasons would cause a film to be other than quality one?

A Well, it can be—well, you have an X-ray technician that, maybe, has some money in the power company and wants to use more electricity to shoot the X-ray. And so it will be overexposed, or it will be so washed out, and we make a joke with X-ray doctors, that they can cure a pneumonia if they use enough X-ray. It just makes it disappear. If they completely over shoot it it will be black and will wash it out. Same thing if they use too little. It will be underexposed and we'll see a whole lot of stuff that you ordinarily would not see. And some of the other things that will make it more difficult is if you've got your shoulder blade, and they don't have the person get their shoulder blades all the way around the side of the chest, then the shoulder blades will be in the way of the lung; and you're looking at the shoulder blade and the lung. And in looking at the lung, what we're doing is making a black picture out of a three dimensional object. And so, what you've got in that three dimensional object is you've [124] got something from here, that's added to everything back to here. So you have what is called a summation shadow; you're seeing the sum of everything that was in that X-ray. The X-ray can be—the person can be turned wrong. There are a lot of things that can go to reduce the quality of the X-ray, though. And then the next thing that you do is you

look at whether or not the film is negative, meaning since you're reading for pneumoconiosis, and other diseases, is it negative for everything? And if it's not, then you check "No". Then you decide for this question: Are there any (inaudible), meaning, lung tissue, abnormalities consistent with pneumoconiosis. And you notice that it says, "Consistent with pneumoconiosis." The X-ray does not diagnose pneumoconiosis. It's either consistent with it or inconsistent with it. There is no way that the X-ray can absolutely diagnose anything that requires more than that. To diagnose any pneumoconiosis such as coal workers' or asbestosis.

The next question: If you find any of these abnormalities then you mark these areas and you mark, P, Q, or R, around the things which are associated with coal workers' and silicosis. S, T, and U, which [125] are irregulars which are associated with asbestosis. And then you state where it is. Is it in the upper zones of the lungs, the mid zones of the lungs, or the lower zones of the lungs. And then you have to say, how much is it distributed? And there is a twelve point system for saying that. If it is 0/-, that's a barn door normal. You almost don't see a 0/- unless you've got somebody twenty, twenty-five years old. Because as you age, you get a little age of the lung, also. A 0/0 is normal. A 0/1 means that you thought it was normal, or maybe, that you considered that it might be a 1, or a category.

Now, what are the standard film, there are standard films that you put up. They are one side versus the other side with the X-ray. Standard films, there are only these right here. There are no 1/0's, 2/1's, etc. There has been a consideration of doing that, but there are none. The doctor has to use his mind's eye. He put's up the 0/0, the 1/1, or the 0/1 or 2/2. Sort of uses his eye to prepare and see what subject X-rays and a little of how they should look.

And there are the standard films for what are called large opacities. These generally occur in [126] coal workers, with

silicosis, but they don't occur in asbestosis, except in extremely rare conditions. And then you go to the lining of the lung. And there are two groups of pleura, the sides against the lungs, the sides against the chest wall. And then there is a little film of liquid in between, a very thin film. The only reason for that is because the lung to move across the chest wall, and if it didn't move smoothly, you'd scream with every breath; and then you'd have pain with every breath. So you look to see whether there are any pleural changes that might be consistent with pneumoconiosis, and then mark that. And then down here, under other symbols, these are other diseases, and also, have to do a little bit with pneumoconiosis. Not much. There are a couple of them that have to do with pneumoconiosis. The others do not. For instance, EM is emphysema, EF would stand for infusion, or fluid in the lung space. And then down here is a place for the doctor to make comments about the rest of the chest and other diseases that he's found that don't fit in here. And in this particular gentleman, Mr. Shirley, he has wire, he's had a heart operation so he's got wires holding his breast bone together. He's had a valve put [127] in, an artificial valve, and that shows up on X-ray. He's got a what's called a pleural stripe because he's over weight and that's the fatty tissue that overlaps on the chest X-ray. And then he's got a little bit of increase here in what is likely related to his heart valve, his heart surgery. And I think he's had congestive heart failure and he's got a little bit of ongoing type of congestive heart failure.

Q This is what we refer to as an ILO form; is that right, Doctor?

A Yes.

Q When you look at an X-ray and do a B-reading, is there any part of a chest X-ray that you look at, or do you look at the entire chest X-ray because if you're only looking at part of the chest X-ray, then you lose other clues that will tell you actually what's going on in the chest X-ray. For

instance, you can have little lines that appear in the outside of the chest X-ray, but if you are only looking at that part, you might say that those were lines that are consistent with a pneumoconiosis some type. However, if you look at the rest of the X-ray, and you see that the heart is enlarged, and you see that there [128] is distention of the vascular clarity and the upper parts of the lungs, then you know that those lines are probably just interstitial edema because of heart failure. So, if you've restricted yourself to looking at only a piece of the lung, you're really losing your clues that would help tell you what those changes are so that you can answer the question fairly whether or not it's either consistent with, or inconsistent with a pneumoconiosis.

Q Will changes caused by smoking appear in an X-ray?

A Yes.

Q What type of problems created by smoking will appear on chest X-ray?

A Well, tobacco smoking, of course, is the major reason for emphysema. Over 95% of the cases of emphysema are all caused by tobacco smoke. There are a few that are other causes for emphysema, but one that's inherited. But most of it is caused by tobacco smoke. So emphysema is one disease that you can see on the X-ray. There is also one called respiratory bronchiolitis, or tobacco smoke induced respiratory bronchiolitis. And what this is is a thickening around [129] the bronchial tubes, which appears like line shadows, or irregular shadows, and it has been estimated that in up to—that all smokers have this; all tobacco smokers have it, but it becomes apparent on the X-ray in about 7-10 percent of people. And it shows up as line shadows that can be confused with a pneumoconiosis, such as asbestosis.

Q Very briefly, how does smoking affect the lung in terms of impairing the lung? I know that those two terms are inconsistent, but just in a thumbnail sketch.

A Smoking paralyzes the ability of the lung to remove things, remove foreign objects from the lung. It paralyzes

what's called the ciliary system, which is little hairs beating in the lung to carry the mucous out so that whatever mucous is trapped, whatever we've breathed out of the air, the dust, the bacteria, viruses. Whatever we've breathed in that's trapped in the mucous and carries it out.

I'd give you an example of the hair that moves out, but I don't have much experience with hair, so I can't give you that example. The lung, when it retains this mucous, eventually, mucous glands begin to [130] cause more mucous, and the mucous builds up and the person gets what's called the smoker's cough in the morning. Generally, in the morning, because the mucous builds up overnight, and then they clear that in the morning and they're pretty good throughout the rest of the day. Eventually, it builds up to where they're coughing up mucous all throughout the day, also. And this is called, then, chronic bronchitis. And after the person develops chronic bronchitis, most doctors now believe that is a stage of, and a preliminary to developing emphysema. An emphysema is an actual destruction of the lung, where those little air pockets, alveoli, are destroyed and they break down, the walls break down in between.

Q Does cigarette smoking impair the lung's ability to get air, or take the carbon dioxide out of the blood?

A It impairs the ability to get air out when you have chronic bronchitis that results in obstruction, and then it impairs the ability to get oxygen in as the chronic bronchitis becomes worse and the emphysema develops.

Q So cigarette smoking then, at least in [131] most cases, or until you develop emphysema, causes an obstructive type of respiratory impairment; is that correct?

A And emphysema is an obstructive defect. Yes.

Q So when a doctor refers to something as chronic obstructive pulmonary disease in a smoker, is that generally referring to the condition of his lungs related to smoking?

A Yes. Actually, there are only in very strict classifications in what's called COPD, there is only chronic

bronchitis and emphysema. Asthma is not included. That's a different type of disease. But it's still an obstructive disease, but it's not classified under chronic obstructive pulmonary disease.

Q Doctor, does smoking cause cancer?

A Yes.

Q What is the number one cause of cancer in the United States?

A I believe tobacco smoking is the number one cause of lung cancer in the United States, and throughout the world.

Q When someone talks about an exposure to [132] asbestos, what does the word "dose" mean to you?

A Well, it means the same as if they were taking medication, it would be whether they took ten milligrams, or twenty milligrams, or a hundred milligrams; and it would be the same with the dose of asbestos. It would mean that they either had ten fibers, twenty fibers or a hundred fibers that they were exposed to and took into their lungs or their respiratory system.

Q What does latency mean?

A Latency is time from first exposure to a substance, to the time when you expect a disease process to develop from that exposure.

Q Doctor, if we discuss asbestos, is latency affected by dose?

A It is in some cases, or some of the different asbestos diseases.

Q Let's discuss asbestosis. Is latency affected by your dose exposure to asbestos?

A Well, it's said that asbestosis is more likely to develop if you have a shorter, higher exposure to it, then if you have a lower exposure and a longer duration.

[133] Q If someone has a history of exposure to asbestos with a long latency period before development of asbestosis, can that inversely tell you something about the type of dose exposure they may have had?

A It tells you that it was lower to begin with.

Q What's the average latency period within reason, as regards development of asbestosis?

A About twenty years.

Q What's the shortest latency period in reason, as regards development of asbestosis?

A Well, I've seen literature to the effect that it can be as short as fourteen years.

Q Will that be with extremely high exposures? The fourteen years' latency?

A Yes.

Q What's the longest latency as regards development of asbestosis that you're aware of?

A Well, that I'm aware of in my practice, it has gone as high as thirty years, but no higher than that.

Q Doctor, if a person has asbestosis, how does that show up on pulmonary function tests?

[134] A It shows up as a restrictive defect. It shows up as a normal FEV1/FVC ratio. A forced vital capacity that's below the lower limit of normal. It shows up as a reduction of the total lung capacity, on the lung volume study, and a proportionate reduction of the residual volume. It will also show up in a reduction in diffusing capacity and will remain reduced when it's corrected for the alveolar volume.

Q Doctor, if you have a worker who was exposed to asbestosis many years ago, is now retired and is in his late 60's, early 70's and he has not developed asbestosis. Of course, in that question we assumed he had asbestos exposure some years ago. Could you state to a reasonable degree of medical certainty that that person wouldn't develop asbestosis given the latency?

A Yes.

Q And, I should say, that in that I assume a latency of forty years, or so.

A Yes.

Q If a person in their, or in his or her 60's, or 70's does develop asbestosis, do you believe to a reasonable degree of medical certainty, that that person would have a progression if they only had a 1/0, [135] or 1/1 diagnosis of asbestosis.

A Are you talking about a significant progression?

Q The fact of significant progression.

A Well, a significant progression to the point where they would have some level of lung impairment from asbestosis. If they are at that age group, in the older age group, the likelihood in the older age group is that they are not going to significantly progress before some other disease process develops that would shorten their life span. Such as heart disease, or some other—maybe diabetes that they have has caused their kidneys to fail, or something like that.

Q Doctor, can you state to a reasonable degree of medical certainty that exposure to asbestos, without development of asbestosis will shorten a person's life expectancy?

A No.

Q Your answer was "No" you could not state to a reasonable degree of medical certainty that a person to exposure to asbestos wouldn't have a shortened life span as a result of that exposure to asbestos even [136] without development of asbestos; is that correct?

A I'm not sure I understand, yet. If a person is exposed to asbestos, but does not have asbestosis, and will it shorten their life span if they have not developed asbestosis?

Q Right.

A No, it will not.

Q I touched on this a moment ago, if a person in their late 60's, early 70's X-ray evidence of asbestosis, say a 1/0 or 1/1, diagnosis of asbestosis, does the slight degree of profusion impact in any way, your opinion regarding likely progression of that disease?

A Yes, because in that particular low profusion category, there is a small percentage of progression that will occur of maybe 8%, in some studies up to 25%. But again, in the older

age group, you usually have other disease processes that are going to shorten their life span before there can be significant progression to the point to where it would shorten their life span.

Q When we looked at the ILO Form a moment ago, you pointed out the symbol regarding pleural [137] changes, consistent with asbestos exposure; is that correct?

A Well, a pleural plaque—if you ever went to the movie theatre in the old days—well, maybe still, I don't know. I quit putting my hands underneath the seat at the movie theatre a long time ago, because you get all of these wads of gum underneath the seat. A pleural plaque would be just like that. It would be like a wad of gum that somebody had stuck up underneath the seat. If you look at the inside of a chest, up against the ribs, and you would have that wad of gum stuck right there to the chest wall where the ribs are, and it would just appear as a smooth little wad that had been planted up against the chest wall. Or I never did this when I was in school, but spit balls on the ceiling, would be the same sort of thing like maybe a plaque that would be hanging on the ceiling.

Q If a person has a pleural plaque, caused by asbestos exposure, is there any literature that supports the proposition that the pleural plaque will turn into asbestosis?

A No.

Q Does a pleural plaque cause any pulmonary [138] impairment?

A No.

Q If a pleural plaque has been caused by asbestos, what does that tell you?

A It just tells you that they've been exposed to asbestos, it doesn't tell you anything else.

MR. BAKER: Your Honor, this would probably be a good time for a short break.

THE COURT: Okay. Let's take ten minutes.

(Whereupon, a brief recess was taken after which the following proceedings were had)

BY MR. BAKER:

Q Doctor Renn, I'd like to talk to you now about your practice, or the testing regime you have when someone to be examined comes to your office. How do you begin your testing protocol?

A Well, they come in and are checked in by one of my nurses, who takes certain information, such as a list of medicines that they have and then takes their vital signs: blood pressure, pulse, and so forth. And then places him in one of the examination rooms so that I can go in and talk to them, and do the interview, take [139] all the histories, and do physical examination. After that, then go for the various laboratory tests.

Q Do you take the actual occupational history?

A We have them fill out a form which has the occupational history. They fill that out so that they have time to remember the dates, and so forth, if they don't bring one with them. But then, after that, I take that form and go over that form with them and fill in the gaps, or help to amplify that, or ask questions if they haven't put down enough on that particular form.

Q When we say occupational history, that's a work history with any alleged exposures?

A Yes.

Q You also take a cardiopulmonary history, don't you?

A Yes.

Q Is that taken by you or is that a result of the data you collect?

A No, it's taken by me.

Q Do you also take the smoking history?

A Yes.

Q Do you take the personal history?

[140] A Yes.

Q Do you take the family history?

A Yes.

Q The past medical history?

A Yes.

Q Do you also take the review of symptoms?

A Yes. Systems.

Q Sorry. Systems. Who performs your laboratory evaluations?

A The laboratory tests are performed by the technicians who are certified to do those tests. If the technician, for instance, in pulmonary function testing is having some difficulty, he or she may come and ask me to help out, but they perform the actual testing procedures.

And the only testing procedure that I might perform, or that I do perform, is if the person undergoes an exercise test, and then I am there to not only do part of the testing, but to make sure that it's done safely.

Q Does an X-ray technician take your X-ray?

A Yes.

Q And your pulmonary function tests are [141] taken by a pulmonary technician; is that correct?

A Yes. Certified pulmonary function technician.

Q Is the procedure that we just discussed and the areas of history that we just discussed the same in every evaluation that you did?

A Well, they are the same within certain limits. Some people you can do exercise testing, some you can't, for various reasons, some can undergo some tests, or there are indications that they should have certain tests, whereas others should not. For instance, in some individuals an echocardiogram may be necessary, but that is on a case specific basis, and not given to every person.

Q But as far as the type of histories that I've discussed, the occupational, the cardiopulmonary, the smoking, medical, family, past medications history, all those are taken as a part of every evaluation; is that correct?

A Yes.

Q Then the testing that you determine is necessary, or that can be done safely is then performed; is that correct?

[142] A Yes.

Q Doctor, I'd like to begin by talking about Mr. James Spangler. Do you have his report with you?

A Yes.

Q Well, the most important part is that he's had pneumonia on several occasions, which is not uncommon in people with obstructive airway disease, because the infectious agents can't get out. He's been a long time tobacco smoker. He's—by the history he gave to me, he's had about a 112 pack years of tobacco smoking. So a pack year is a pack a day for one year, and so he's done that. There are times that he's smoked more than two packages a day, and when I interviewed him, he was smoking three quarters of a package a day. So I calculated it out to 112 pack years. He's on various breathing medications for obstructive airways disease of some type, and on his physical examination he had—when you listen to his lungs, he had a long period of breathing out, which is consistent with an obstructive disease. He had what are called rhonchi, these are large airway obstructive sounds, and he also had wheezes which are smaller airway obstructive sounds. [143] On his laboratory testing, he had breathing tests which showed severe obstruction on his spirometry.

Q Doctor, which test would show the severe obstruction that you just mentioned?

A That would be the FEV1/FVC ratio, which was 43% before bronchodilator, and it was 43% after bronchodilator, so it's below the lower limit of normal; and that indicates if we look at the FEV1 and the FEV1 is then below the lower limit of normal and its percent of predicted was 48% before bronchodilator and 53% after bronchodilator. And that indicates that he has a severe obstructive defect, or an obstruction to the outflow of air.

Q Doctor, did any of the pulmonary function tests, or lung volume studies that you did indicate that Mr. Spangler had a restrictive condition?

A No, in fact, he has the opposite. His total lung capacity indicates that he has hyperinflation—it's elevated, and so he has over inflated lungs. And he also has air trapping, or trapping of air in the lungs which is what you expect in emphysema with the big balloons and the narrow neck to the escape of air from the balloon.

[144] Q Did Mr. Spangler, have a diffusion capacity that was normal?

A No. His diffusion capacity was abnormal, it was reduced, and it does remain reduced when you look at the alveolar volume.

Q That would be DLCO/VA?

A Yes.

Q Doctor, did you take a chest X-ray of Mr. Spangler? Did your technician take a chest X-ray?

THE COURT: Yes, ma'am.

JUROR NO. 4: We can't see what's going on.

MR. BAKER: Do you need to have those moved closer to you? I'm sorry.

BY MR. BAKER:

Q The X-ray that was taken in this case, did you do a B-reading on that X-ray or X-rays?

A Yes.

Q Could you tell the jury what you found, or what you saw on the X-ray that you did a B-reading of?

A I saw that he had a plaque of the diaphragm, of the right side and that it had calcium in it, and so, there is a length of the calcium you grade. [145] And this is the length that I found. I found that he had emphysema, I found that he had what's called bullous emphysema, or big balloons-type of

emphysema, and I stated that he had a very large bullae of the left lung which occupied more than two thirds of the left side of his chest.

Q Is it just like a balloon inside the left side of his chest?

A Yes. It's like somebody would just stick a balloon in there and somebody would just stick a balloon in there and just blow it up, keep blowing it up. And what happens is that the lung gets pushed, or what normal lung gets pushed somewhere else; gets pushed and squeezed together. And in fact, I said that he might benefit from what's called bullectomy, which means that if this was removed, that the what normal lung is there could expand, and maybe, help him with his breathing. And I believe I sent him a letter to this effect.

Yes, I did, I told him that maybe he might get some benefit from that, if he would go see a lung specialist, or even a surgeon who would operate to remove that.

[146] And then he has a lot of these bullae, or several of these bullae, that are pushing down on the lung and it squeezes everything together, makes everything look more dense down on the bottom of the lung. And in emphysema you'll get this kind of thing, because the diaphragm can't move as well. It's also pushed down, so you get what looks like a blunting of the diaphragm. And then these little metal clips. They were just from an old operation that he had to correct an esophageal hernia that he had. A hernia of the esophagus.

Q Did you reach a—I note in what's identified as page three of the pulmonary function report, you discuss a severe obstructive ventilatory impairment. Is that the impairment that's related to the emphysema?

A Yes.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to the cause of Mr. Spangler's severe emphysema?

A Yes. I believe it's from his years of tobacco smoking.

Q Doctor, does exposure to asbestos cause [147] emphysema?

A No.

Q What do you believe has caused or contributed to the moderate drop in Mr. Spangler's diffusing capacity?

A Well, that's from destruction of the lung, which is from the emphysema.

Q Emphysema will cause a drop in the diffusing capacity?

A Yes.

Q Doctor, did you reach, or can you say to a reasonable degree of medical certainty your opinion as to whether Mr. Spangler has a pneumoconiosis, including asbestosis?

A I believe he does not.

Q Doctor, do you believe to a reasonable degree of medical certainty that Mr. Spangler has markers of having been to asbestos?

A Yes.

Q Can you state to a reasonable degree of medical certainty whether the markers, and those are the pleural changes that you discussed, have any likelihood of causing a decrease in Mr. Spangler's expected life?

[148] A They do not.

Q Doctor, based on your review of the medical testing that you did in this case, can you testify to a reasonable degree of medical certainty as to whether you believe that Mr. Spangler will develop asbestosis at some time in the future?

A I believe that he will not. He has not to this point and I believe that he will not.

Q I'm sorry. Before we move on I would like to show you—Doctor Renn, I'm handing you what's been marked as Defendant's Exhibit No. 6. Would you please take a moment to look at that, please? Doctor, would you tell the jury what Defendant's Exhibit 6, is?

A It's an X-ray reading by Dr. Capiello, of an X-ray dated 9/1/95 for a James M. Spangler.

Q And what was the impression for the chest X-ray?

[A] It says residual fibrosis in the area of prior infiltrate, severe segment of the left lower lobe with what appears to be small thin walled cavity. There seems to be some severe particle disease in this region and the infiltrate may not be totally resolved. The remote possibility of this representing an atypical presentation of TB, standing for tuberculosis, cannot be [149] excluded, and in addition, if clinically warranted, a CT scan, a CT of thorax may be contemplated. No evidence of new infiltrate elsewhere, no evidence of cardiomegaly, or CHF, standing for congestive heart failure.

Q Did you say that was Dr. Capiello?

A Yes.

Q Is Dr. Capiello a NIOSH certified B-reader?

A To my knowledge, yes.

Q Doctor, I'd like to hand you what's been marked as Defendant's Exhibit 7. Would you tell the jury what Defendant's Exhibit 7 is?

A This is an X-ray from the Bluefield Regional Medical Center, dated 12/30/95, for James M. Spangler. It's interpreted by Dr. Acoff.

The impression is, "Patchy right lower lobe pneumonic infiltrate believed to represent new findings since previous photo of 10/6/95. COPD. Chest otherwise unremarkable".

Q Is Dr. Acoff, is that Dr. Edward Acoff? Is Dr. Acoff a B-reader?

A To my knowledge, yes.

[150] Q Doctor, I'm handing you what's been marked as Defendant's Exhibit 8. Would you take a moment to take a look at that record?

A Yes. This is James M. Spangler from Bluefield Regional Medical Center. The date is 6/18/96. It's interpreted by Dr. Acoff, signed by Dr. Shahan. The impression is: "Pleuroperitoneals scarring of left lower lobe, with associated

large bullous changes and progressive overall improvement in appearance of left lung infiltrates and previous study of 5/31/96. COPD suggests continued follow-up examination as clinically indicated for further evaluation".

Q I'll hand you what's been marked as Defendant's Exhibit No. 9. Would you take a moment to look at that and then tell the jury what that is?

A This is James M. Spangler, from Bluefield Regional Medical Center, date of examination is 12/16/96. It's interpreted by Dr. Capiello. The impression is: "Advanced changes of COPD, with emphysemas bullae. Both lungs increased in size and number from the comparison study.

Q Doctor, in Defendant's Exhibits 6 through 8 that were interpreted by B-readers, was there any [151] mention of Mr. Spangler having asbestosis in any of these X-ray interpretations?

A No.

MR. BAKER: Thank you. Your Honor, I would move the admission of Defendant's Exhibits 6, 7, 8, and 9.

THE COURT: Without objection they will be received.

(Whereupon, the documents previously marked Defendant's Exhibits Nos. 6-9, were admitted and made a part of the record)

BY MR. BAKER:

Q Dr. Renn, we didn't touch on this a moment ago. I'd like to do that now. When you take a history of exposure from someone who comes to you for an evaluation, do you accept their history as accurate?

A Yes.

Q Do you have any way to judge the accuracy of the history they've given you?

A No. There is no way for me to judge.

Q So you accept that every person that [152] comes for a evaluation has a reliable history of exposure?

A Yes.

Q I'm reading from what had been marked as Defendant's Exhibit No. 5, and this is a copy of the ATS guidelines. Are you familiar with these guidelines, Doctor?

A Yes.

Q What are these, briefly?

A They are guidelines that were published in an official statement by the American Thoracic Society, I believe in 1986, that is for the diagnosis of nonmalignant diseases associated with asbestos.

Q And you always accept the reliable history of exposure and you checked that "Yes"; is that right?

A Yes.

Q Do you accept that a plaintiff, or a person who comes to see you for an independent medical evaluation has a sufficient interval between exposure and the time they're having the examination, if their history indicates to you that they've had the latency period?

[153] A Yes.

Q In your examination of Mr. Spangler, and his X-rays and pulmonary function tests, did you find any X-ray evidence of Type S, T, or U, small irregular opacities of a profusion of 1/1, or greater?

A No.

Q Doctor, I want to touch on that for just a moment. Explain to he jury, if you would, what is a profusion of 1/1 required by the American Thoracic Society before a B-reader can diagnose asbestosis?

A It's not required, it is a suggestion or guideline. It's not required. And in fact, I've diagnosed people that have had profusion categories lower than that, a profusion category lower than that of 1/0.

Q Where does most inter-reader error occur in interpreting X-rays?

A It occurs in the very low profusion categories of 0/0, 0/1, 1/0, 1/1.

Q So that's the hardest place for different B-readers to get the same readings of the same X-ray?

A Yes. Very difficult.

Q Doctor, in your examination of Mr. [154] Spangler, did you determine a restrictive pattern of lung impairment with a forced vital capacity below the lower limits of normal?

A No.

Q Did he have a diffusing capacity below the lower limit of normal?

A Yes.

Q And you attributed that to his emphysema; is that correct?

A Yes, when you have a confounder you can't use that particular criterion because you have a confounding factor.

Q Yet something is causing one of these criteria to occur.

A Yes.

Q On your examination of Mr. Spangler, did you note any bilateral, late, or pan inspiratory crackles of the posterior lung bases not cleared by cough?

A No.

Q If you would get your file on Mr. Ayers, please. Dr. Renn, did you follow the same testing procedure, as you recall, with Mr. Ayers that you did [155] with Mr. Spangler?

A Yes, I did.

Q In looking at the history and the test results you have regarding Mr. Ayers, what parts of your findings were significant in your opinion?

A Well, Mr. Ayers had had a heart attack. In the 1980's he had become disabled because of that. He had a smoking history of 40 to 50 pack years. He had a stroke and he had some residual paralysis as a result of that stroke. He had—that was on the right side. And then on his X-ray, he had over expanded rhonchi. On his X-ray that is all. And he had on his spirometry a mild obstructive ventilatory defect. And those were the important parts of his examination.

Q When you say he had a mild obstructive ventilatory defect, would you please step down for a moment and outline, or highlight on the spirometry report those things that led you to conclude that he had a mild obstructive defect.

A His FEV1/FVC was 67% before and 67% after the bronchodilator. Now, although this is below the predicted which would be the mean predicted for him, it was not below the lower limit of normal expected for his [156] age of 70. So technically speaking, I could have said this was a "normal" test, if I went only by the numbers. However, in looking at Mr. Ayers' graphs, and this is why it's important for the doctor to also look at the graphs. I will show you—you can take this and pass it around. If you look at this down in the lower right hand corner, this is the time-volume curve. And you can pass that to each person, but his time-volume curve, instead of showing the normal, which would have been flattened out as it went up, his showed that he went up and then continued to go up, very slightly. And so, although his numbers looked normal for his age, he has some mild obstruction; and so I said that he had the mild obstruction.

Now, if you notice that he had—before bronchodilator he had 96% of predicted of his FEV1, and after bronchodilator, 101%.

Q Dr. Renn, what's a bronchodilator? I hate to interrupt you—

A They are medicines that are used to open the bronchial tubes. And in a person who has more than a hundred percent of predicted, they are considered very normal. So he's pretty close to normal and that's why I [157] said that he only had mild obstruction. But it was from the graph tracing itself, rather than just going by the numbers which you can't always go by. You have to give some benefit of the doubt to the person and what the graph tracings also show, and that's why it's important for the doctor to look at the graph tracings, too.

Q Doctor, was there any abnormality in Mr. Ayers' total lung capacity, or residual volume?

A No. There was not, it was normal.

Q At 136% of predicted? Would that be considered normal residual volume for a person with an obstruction?

A He would have a little bit, a little tiny bit of air trapping there, perhaps, but if you look at the difference between the predicted value and the actual value, and then the ratio of the two, it's really proportionate, almost proportionate. And so, there is really not much in the way of air trapping.

Q Was Mr. Ayers' diffusing capacity normal?

A Yes.

Q Did it remain so when corrected?

A Yes.

Q When you reviewed Mr. Ayers' chest X-ray, [158] did you find any abnormalities?

A Only that it was over expanded. And that is the hyperinflation part here (indicating).

Q When you say it was over extended, do you mean the lungs?

A Yes. It's almost a code word that's used by X-ray doctors, now. Instead of saying that a person has COPD, or that they took a really, really deep breath, or that they have asthma, they don't know that, they can't tell that from a X-ray. They can sometimes tell emphysema from an X-ray, but they can't tell anything else if the lung is over expanded. So they just put hyperinflation, which is it could be COPD, it could be asthma, it could be that they just took a really, really, deep breath, and he's the kind of person that can take a really, really, deep breath.

Q Doctor, then to ask you regarding, Mr. Freeman Ayers, you would agree that you had a reliable history of exposure; is that correct?

A Yes.

Q And you would agree that you had an appropriate time interval between exposure and latency?

A Yes.

[159] Q Was there any chest X-ray evidence of pneumoconiosis?

A No.

Q Did he have a restrictive pattern of lung impairment with a forced vital capacity below the lower limit of normal?

A No.

Q Did he have a diffusing capacity below the lower limit of normal?

A No.

Q Did he have any bilateral, late or pan inspiratory crackles at the posterior lung bases not cleared by cough?

A No.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not Mr. Freeman Ayers has asbestosis, or any other pneumoconiosis?

A Yes. He does not.

Q Doctor, do you have an opinion to a reasonable degree of certainty as to whether Mr. Freeman Ayers is likely to contract or develop asbestosis in the future?

[160] A I believe that he will not.

Q Do you believe that Mr. Freeman Ayers has any condition that may cause or contribute to a shortened life expectancy?

A Well, he's had his old heart attack, which indicates that he has coronary vascular disease. That will shorten his life span. He also has had the stroke, and that is also gonna shorten his life span. He is overweight which is also another risk factor for shortening life span. He also has high blood pressure which is known to shorten life span and he had an abnormality of his blood, which is not better defined and I don't know whether he has anything really wrong with his blood, or not, because that has to be checked further in order to say that.

Q Doctor, would the conditions that you've just talked about including having had a heart attack, high blood pressure, stroke, would those type of conditions contribute to any difficulties that Mr. Ayers may have testified about regarding his ability to do physical activity?

A Well, if you add all these things together, the very mild obstructive pulmonary disease, [161] the heart diseases, the fact that he has had the stroke and has some residual paralysis from it. All of that will contribute to making him feel as if he has to do more work to breathe.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to what caused the mild restriction that you saw on Mr. Ayers' pulmonary function test, spirometry, and lung volume?

A I didn't see any restriction of lung—

Q I meant to say the mild obstruction.

A He has the 40 to 50 pack years of smoking that would be adequate to cause him to have the mild obstruction that he does.

Q Doctor, would you please get your file for Mr. Doyle Johnson. Doctor, when you examined Mr. Johnson, did you follow the same testing protocol or protocol taking history, that you did, as we've discussed with Mr. Ayers and Mr. Spangler?

A Yes, I did.

Q In looking at your report, regarding Mr. Johnson, what things did you find significant?

A One of the most significant things, regarding Mr. Johnson, is the fact that in 1987, he had [162] a knee injury, and a cast was put on for his knee injury, and he developed a blood clot that went to his lung, known as a pulmonary embolus. Then he has a tobacco smoking history of anywhere between 34 and 64 pack years. He's had several skin cancers and one that is a very serious skin cancer, but apparently from which he's been cured. He's overweight by about fifty pounds above his ideal weight.

And in his laboratory testing he had an elevated white blood cell count, it's such that he might be developing what's called chronic lymphocytic leukemia. I found that he had some mild obstruction, that it did improve after bronchodilator treatment.

Q Doctor, if you would, would you take a moment to highlight for the jury, those things that indicated to you that Mr. Johnson had a mild obstructive impairment?

A Well, again we look at the FEV1/FVC and find it 65% and 70% after bronchodilator. That's below the lower limit of normal at 70 for him. Looking to the FEV1, it is 82% predicted before and 93% of predicted after. If it is in excess of 70% of predicted then it is considered mild obstruction, and so he has mild [163] obstruction.

The reason he has a significant—bronchodilators help him indicates that he has asthma, is that the FEV1 improved from 3.21 liters, up to 3.64, this is 430 milliliters. If it goes over 200 hundred milliliters that's considered significant. If it goes over 12% and 200 milliliters it's considered significant; and so he has significant improvement following broncho-dilator medication.

He does not have a restrictive defect because his total lung capacity is normal. So is his residual volume. And he does have a reduction in diffusing capacity and it stays reduced, and I believe the explanation for that being reduced is because of his pulmonary embolus and the death of lung tissue and the fact that some clot remains there that keeps blood from flowing into that area; however, there is still air that goes into that area and so the diffusing capacity would be reduced because of that.

Q Doctor, did you take a chest X-ray, or have taken a chest X-ray of Mr. Johnson?

A Yes.

Q Did you take an ILO reading as reflected [164] by the ILO Form? Would you tell me what you saw on that chest X-ray?

A I saw that he had only the abnormality at the left lower part of his lung, the abnormality could have been fluid, because I couldn't tell if it was just fluid from just that X-ray or if it was old scarring. Later on, I had other X-rays given to me that showed me that it was there and had been there and so it was old scarring that had resulted from the blood clots in his lungs. And so I read it as the likely reason, or if I found nothing else in his chest.

Q So then you found no indication on chest X-ray that Mr. Johnson had a pneumoconiosis, including asbestosis?

A That's correct.

Q You mentioned that you had additional chest X-rays made available to you that confirmed to you that the findings that you made on this report were consistent with the old pulmonary embolus; is that correct?

A Yes.

Q How many X-rays did you have an opportunity to review?

[165] A I had two other X-rays on two other dates. From 8/29/92, and then I had two from 8/28/97.

Q On any of the chest X-rays that you reviewed, did you find any findings consistent with the pneumoconiosis, including asbestosis?

A No.

Q I'm showing you what's been marked Defendant's Exhibit 11, and we'll both agree that you found both one and two, reliable history of exposure and an appropriate latency period; is that correct?

A Yes.

Q In your review of Mr. Johnson's multiple chest X-rays, did you find any X-ray findings consistent with pneumoconiosis?

A No.

Q Did you find a restrictive pattern of ventilatory impairment with the reduced or the forced vital capacity below the lower limit of normal?

A No.

Q Did he have a diffusing capacity below the lower limit of normal?

A Yes.

Q What was the cause of his diffusing [166] capacity being below the normal limits?

A I believe that's from his old pulmonary embolus.

Q And how would the old pulmonary embolus contribute to or cause a reduction in diffusion capacity?

A It blocks the blood flow, but the air is not blocked in that part of the lung and so it isn't any oxygen, or in this case carbon monoxide which is used for the diffusion capacity study, can't go into the bloodstream since there is no blood flowing to that area.

Q Did you hear any bilateral, late, or pan inspiratory crackles at the posterior lung bases not cleared by cough?

A No.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not Mr. Doyle Johnson has a pneumoconiosis, including asbestosis?

A Yes, he does not.

Q Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Doyle [167] Johnson has asthma?

A Yes, he does.

Q Doctor, do you have an opinion as to a reasonable degree of medical certainty as to whether Mr. Doyle Johnson suffers from mixed dust pneumoconiosis, including asbestosis?

A Yes, he does not.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Johnson will develop asbestosis in the future?

A Yes. I believe he will not.

Q Doctor, to a reasonable degree of medical certainty, do you have an opinion regarding Mr. Doyle Johnson's prognosis for the future? Let me strike that question and ask you a different question.

Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Doyle Johnson has experienced a life shortening event as a result of alleged exposure to dust?

A He does not.

Q Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Johnson might at some time in the future develop a [168] pneumoconiosis associated with dust exposure?

A Yes. I believe he will not.

Q Would you please get your file on Mr. Clifford Vance. Doctor, when did you examine Mr. Clifford Vance?

A I examined Mr. Vance February 16, 1998.

Q Did you follow the same examination protocol that we discussed earlier?

A Yes.

Q Would you please tell the jury what portions of your file, or your report we got on Mr. Vance to be of interest, if any? I shouldn't have said of interest, I should have said of significance.

A Well, the whole file is of significance. It depends on what purpose you're gonna use it for. He has a hiatus hernia of his esophagus, which and the acid that comes backup on his esophagus, or his swallowing tube. In fact, he elevates the head of his bed, and uses one or two pillows to relieve that. And this is important because the acid can spill over into the lungs and the lungs don't like acid. They react very poorly to acid. He also has high blood pressure, which when I evaluated him was not controlled. He was taking high [169] blood pressure medication, but his blood pressure was still quite high when I evaluated him, and that's not good. As far as his tobacco history is concerned, it is anywhere from 47 up

to 71 pack years, and then I did the breathing tests and the chest X-rays and so forth and they were essentially normal.

Q Was Mr. Vance's diffusing capacity normal?

A Yes.

Q Did Mr. Vance have any spirometry test results that were not within the normal range you consider in looking for an obstructive or restrictive impairment?

A No, he did not.

Q So, in your opinion, did Mr. Vance have normal spirometry?

A Yes.

Q Were his lung volumes essentially normal?

A Yes.

Q Did he have any reduction in diffusing capacity?

A No.

Q Did it remain normal when corrected for [170] alveolar volume?

A Yes.

Q Did you take a Chest X-ray of Mr. Vance?

A Yes.

Q Did you have available to you more than one chest X-ray taken of Mr. Vance?

A Yes.

Q Would you please tell the jury what the chest X-ray that you had taken shows, if anything.

A He had only what's called linear, or line atelectasis, which means if you take the kitchen sponge and squeeze it together and close the air holes off, it will appear like a line. That sometimes happens in the lungs, especially someone who has had, say, some infection in that area, or they've had—or they're overweight and they are compressing that air of the lung. For many reasons you can have those little line shows that are called platelike because they look like the side of a plate—looking at a plate from the side.

Q Did you see anything on Mr. Vance's X-ray that indicated to you that he had a pneumoconiosis?

A No.

Q When I say pneumoconiosis, just so the [171] record is clear, that would include asbestosis, or what some call a mixed dust pneumoconiosis?

A It includes all dust diseases; silicosis, aluminosis, all dust disease.

Q Why was it important to you in this case to have other chest X-rays available for your review.

A Well, the other chest X-rays helped to determine whether or not there are changes that can be transient, or color it one time, and then are not present at another; and pneumoconiosis doesn't disappear. Whereas there are other changes that will disappear, such as heart failure, pneumonia, of course, that is cured, and so forth.

Q Doctor, I'd like to show you what's been marked as Defendant's Exhibit No. 13.

A It's Bluefield Regional Medical Center X-ray Report on Clifford A. Vance. The day of examination is 3/29/94. The impression is: Normal chest. And it's read by Dr. Capiello. In fact, he states above there are no stigmata identifiable to allow radiologic diagnosis of asbestosis.

Q This is the same Dr. Capiello that you indicated earlier was a B-reader?

[172] A Yes. I believe he's a B-reader.

Q And to the best of your knowledge was this chest X-ray interpretation rendered in aid of treatment of Mr. Johnson?

A I don't know. It's ordered by a physician by the name of Stephen A. DeGray. There is no indication why it was ordered.

Q Okay. Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not, Mr. Clifford Vance has asbestosis?

A Yes. He does not.

Q Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Vance is likely to develop asbestosis in the future?

A Yes. I believe that he will not.

Q Do you have an opinion to a reasonable degree of medical certainty, if there are any factors in Mr. Vance's life that may affect his expected life expectancy?

A His high blood pressure is going to affect his life expectance if it's not better controlled.

MR. BAKER: Your Honor, I would move [173] admission of Defendant's Exhibit No. 13 at this time.

MR. RION: No objection.

THE COURT: It will be received.

(Whereupon, the document previously marked for the purposes of identification as Defendant's Exhibit No. 13, was admitted into evidence)

BY MR. BAKER:

Q As before you would agree that in Mr. Vance's case, he had had a reliable history of exposure and an appropriate latency period?

A Yes.

Q Did you see any evidence on chest X-ray of type S, T, or U of irregular opacities?

A No.

Q Did you see any evidence on lung testing of a restrictive pattern of lung impairment with a forced vital capacity below the lower limit of normal?

A No.

Q Did Mr. Vance have a normal diffusing capacity?

A Yes.

[174] Q So he had no reduction in diffusing capacity?

A That's correct.

Q Did you note on your examination of Mr. Vance any bilateral, late, or pan inspiratory crackles in the posterior lung bases not cleared by cough?

A No.

Q Doctor Renn, would you please get your file for Mr. Shirley. Would the same protocol followed for Mr. Shirley as to the previous people we've discussed?

A Yes.

Q Could you tell me what parts of your reports regarding Mr. Shirley are of interest to the jury, as to conclusions you reached regarding his medical condition?

A Yes. When I took his history, he told me he had a symptom which is called _____, meaning it occurs off and on, nocturnal, meaning it occurs at night, dyspnea meaning that he experiences forced breathing. I examined him on February the 18th, and he had had an episode on February the 15th, or three days before I examined him.

[175] It's not just getting short of breath, the person has to virtually leap out of bed because they are so short of breath, and they walk about, and they go to the bathroom and pass their urine, and they go back to bed and they can lie down and sleep the rest of the night without any problem. It doesn't happen to them again in the same night.

Now, it's different from people that have other breathing problems. It might happen to them two, three, four times; or asthma, or something like that. This is a very specific symptom and it means that they are experiencing little episodes of left heart failure. In other words, fluid is backing up into their lung and they are experiencing a little bit of left heart failure.

He also had two pillow orthopnea which means he props himself up on two pillows, and sometimes people do that because then gravity will then keep that fluid down to the bottom of the lungs and they can breathe a little more easily.

He also had swelling of his legs when he was on his feet for a long time, and that also is a symptom, except it's a symptom of right heart failure.

[176] And then, when I talked to him and I had his medical records, or some of his medical records which showed that he'd been hospitalized in July of 1995. He had been in heart failure at that time. He was found to have a valve of the heart that only had two parts to it, instead of the three that it ordinarily should have. If you can see up into the heart here (indicating), or even on the other side, the pulmonary artery, there are three sections to the valves. If there's only two sections, and you can imagine three sections put together can open more easily than two because they are tight across the opening itself. And so, whenever you find this it's called a bicuspid or two tooth valve, instead of a three tooth valve. It should be replaced, because it puts too much strain on the heart and allows the heart to fail; and indeed this is what he had done. And when he did his heart catheterization to find out what was wrong with his—why he was in heart failure, he found out that he also had some disuse to the arteries of the heart, the oxygen to the heart, coronary artery, so he also had heart disease. I should say coronary artery disease, or what will cause a heart attack and so they repaired that [177] at the same time. And then after his valve had caused the left side of his heart to get bigger and so he had that finding also. And then after he was operated on, his right lung collapsed and that had to be taken care of with a tube to suck the air out. He's not a smoking individual, he was overweight, he was 76 1/2 pounds over his ideal weight. When you listen to his heart you can hear—it makes a metal click. An artificial valve makes a metal click. You can hear that. He had a few little crackles at the right base of his lung, and they disappeared, but not completely, after he had given me a deep cough. And what this means is that he had a little bit of fluid in some of the small airways of the lung, and then when I checked his feet and his ankles and his legs, he had some swelling or fluid

that was in there. So all this indicated that indeed he does have congestive heart failure, he has a little bit of sign of congestive heart failure, although he is not in clinically overt congestive heart failure to the point where you say you got to go into the hospital and be treated for it.

Q I'm sorry, is there more that you'd like to comment on in your report?

[178] A No.

Q Did you have an opportunity to take a pulmonary function test, or battery of pulmonary function tests for Mr. Shirley?

A Yes. In Mr. Shirley, he had normal lung function as far as his spirometry is concerned. He does have in the lung volume study, he still—his total lung capacity is still above 80% of predicted, so that is normal for him. It could be higher except for his weight. That is reducing his total lung capacity somewhat because of the compression of his weight to the chest and his abdomen on his diaphragm and his chest wall. And he had reduction in diffusion capacity and that corrected all the way to normal when you consider the alveolar volume, and the reduction of diffusion capacity if he has fluid overload from congestive heart failure that will reduce his diffusion capacity. And the fact that it corrected when the alveolar volume was considered is an indication that he has no interference with oxygen, or diffusion.

Q Doctor, did you have a chest X-ray taken for Mr. Shirley at your office?

A Yes.

[179] Q Would you tell the jury what your findings were in reviewing Mr. Shirley's chest X-ray?

A Well, this is actually the one we looked at before, when I was using it as an example, and it showed that his breastbone was wired together from the heart surgery, that he had the artificial valve in his heart; and then, as I said these pleural stripes are considered to be fatty tissue that is lining the lung. The way you tell those from plaques is that they

extend from the top of the lung all the way along the side down and they don't become irregular like plaques do, or pleural plaques. They extend from the top of the lung all the way along the side down and they don't become irregular like plaques do; and so, it looked like it was from fatty tissues. And then he had these little reticular markings at the side of the right lung, and the right lung is where I heard the sounds at the base and where I think that he probably has some fluid overload, some very mild degree of a little bit of heart failure. Although you couldn't say that he really was in heart failure at the time.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or [180] not Mr. Shirley has a pneumoconiosis, including asbestosis?

A Yes. He does not.

Q Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Shirley may contract or may develop a pneumoconiosis, including asbestosis in the future?

A I believe that he will not.

Q Doctor, when you make that conclusion, is that based on our earlier discussion regarding dose, latency, profusion, or lack of profusion in this case?

A Yes.

Q Doctor, if Mr. Shirley had testified that he experienced great difficulty in going about his daily activities, is there anything in your examination of him to which you would attribute to a reasonable degree of medical certainty, as the cause of his difficulties?

A I believe there are two things that are contributing to that. Number one is his weight and number two is the fact that he's had a very serious heart operation. And I believe those two combined contribute to that.

Q Certainly though, in the lung testing [181] that you did you saw nothing to indicate that Mr. Shirley's pulmonary system isn't functioning at least very, very close to normal?

A That's correct.

Q So then do you agree, or do you have an opinion to a reasonable degree of medical certainty as to whether any problems with daily activities that Mr. Shirley may have complained of would be caused by any impairment in his respiratory system?

A Yes. They would not.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Shirley's life expectancy has been shortened in any way as a result of exposure to dust, while employed by the railroad?

A I believe it has not.

Q And if I've asked you this question, please correct me. Do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Shirley has a likelihood of developing a dust related disease in the future?

A I believe he does not.

Q Once again, back to the chart, we have a [182] reliable history of exposure and appropriate latency period. Did you find any chest X-ray evidence of S, T, or U, type of regular opacities?

A No, I did not.

Q Doctor, did you have more than one X-ray to review for Mr. Shirley?

A Yes.

Q How many did you have?

A There were seven, in addition to the one I had.

Q In your review of any of those chest X-rays, did you ever conclude to a reasonable degree of medical certainty that there were any findings, or anything showing on those x-rays that indicated that Mr. Shirley had a pneumoconiosis, or any findings consistent with a pneumoconiosis?

A Not when you considered all of the X-rays together

Q I believe you touched on that earlier. What you're saying, I believe, is that on some of the earlier X-rays there may have been findings that could have been interpreted as

consistent with a pneumoconiosis, but if you look at later X-rays those [183] findings had disappeared; is that correct?

A That's correct. On the July 1995, chest X-ray, if you had only that X-ray, then you could say that it would have been consistent with a pneumoconiosis. However, that was during a period of heart failure and then it disappeared later on.

Q Did Mr. Shirley have a restrictive pattern of lung impairment with an FVC below the lower limit of normal?

A No.

Q Did Mr. Shirley have a diffusing capacity below the lower limit of normal?

A No.

Q Did Mr. Shirley have a diffusing capacity below the lower limit of normal?

A Not when you consider the alveolar volume, no.

Q Did Mr. Shirley have a diffusing capacity below the lower limit of normal?

A Not when you consider the alveolar volume, no.

Q In your medical opinion, which is to a degree of reasonable medical certainty, do you believe [184] that it's necessary to correct for alveolar volume?

A Yes.

Q So then your question to answer number three would be that he did not have a diffusing capacity lower than normal?

A That's correct.

Q Did he have any late or pan inspiratory crackles at the posterior lung bases that are not cleared by cough?

A No. The key word being bilateral.

Q Would you please get your file for Mr. Butler. Did you follow the same examination protocol?

A Yes.

Q Would you please look at your report and tell the jury those things that you believe, or those things which you've found to be significant in making a diagnosis regarding

whether or not Mr. Butler has asbestosis, or mixed dust pneumoconiosis?

A I found that he had pneumonia on one occasion during childhood which sometimes leads to respiratory problems later on in life, that he had had high blood pressure since 1997, that his tobacco smoking history is rather minimal, he had ten pack years of [185] smoking. I found it important that he was—had had broken ribs, that he was overweight, that his weight was 56, almost 57 pounds over his ideal weight. And then I did the laboratory testing.

Q Did you, as part of your laboratory testing, did you take the pulmonary function test and lung volume, and diffusing capacity studies that we've discussed earlier?

A Yes. And then I did the laboratory testing.

Q As part of your laboratory test, did you take the pulmonary function and lung volume and diffusing capacity studies that we've discussed earlier? I believe that we may have used Mr. Butler for one of our earlier explanations, actually.

Did you note any reduction in diffusing capacity for Mr. Butler?

A No.

Q His diffusing capacity was at least or better than normal?

A Yes.

Q Did you note any obstructive or restrictive impairment in Mr. Butler?

[186] A No.

Q Was Mr. Butler's forced vital capacity within the predicted?

A Yes.

Q And his FEV1/FVC was within predicted values?

A Yes.

Q His total lung capacity was within the predicted values?

A Yes.
Q Do you find the 75% of predicted value for residual volume to be of significance?
A No, that's still within normal range.
Q You wouldn't look at residual volume by itself and ascertain whether someone did or didn't have a pneumoconiosis related breathing impairment, would you?
A No, because the residual volume would be reduced in a person who was overweight, but so would the total lung capacity. Usually, they're proportionately reduced, and this is fairly normal for the proportion, this 3.2.
Q Did you take a chest X-ray of Mr. Carl [187] Butler?
A Yes.
Q I'm showing you a blown-up copy of the ILO form that you completed following your chest X-ray of Mr. Butler?
A Yes.
Q Would you please tell the jury what, if any findings you saw, or you made regarding Mr. Butler's chest X-ray?
A Well, from the X-ray alone, I could not be certain whether it was just because he was overweight, or if he actually had pleural plaques. And so, I marked it giving him the benefit of the doubt. I marked it as if he did have pleural plaques. However, as a B-reader, what you're supposed to do is then explain it down here, and I said that he is obese. And some or all of the findings in 3C, that being this area here, could be fat tissue, rather than plaque: There is a bilateral pleural stripe, consistent with Adipost tissue, and the oblique views do not confirm the presence of plaques. A high resolution CT scan of the thorax should be obtained to resolve the question. I feel I couldn't resolve it just from the plain X-ray.
[188] Q You couldn't state to a reasonable degree of medical certainty that he did or didn't have either pleural plaque or Adipost tissue; is that correct?
A That's correct.

Q Did you see any other abnormalities, or possible abnormalities on Mr. Butler's chest X-ray?
A No.
Q Doctor, do you have an opinion as to a reasonable degree of medial certainty if Mr Butler does have pleural plaques, do you believe that his life expectancy would be affected in any way by those pleural plaques?
A Not from pleural plaques, no.
Q Doctor, do you have an opinion as to a reasonable degree of medical certainty as to whether Mr. Butler has asbestosis, or mixed dust pneumoconiosis?
A I believe he does not.
Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Butler has asbestosis, or mixed dust pneumoconiosis?
A Yes, I believe he does not.
Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. [189] Butler has asbestosis or mixed dust pneumoconiosis?
A Yes. I believe he does not.
Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Butler suffers from any condition known to you which might be life-threatening?
A No, he does not, except for being overweight. That will shorten his life span, but that's the only thing.
Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Butler will develop asbestosis in the future?
A I believe he will not.
Q Doctor, if Mr. Butler had complained that he is no longer able to carry on his daily activities like he could ten years ago, did you see anything or find anything in your examination or testing of Mr. Butler that would explain why he may no longer be able to proceed at the pace that he wants to?

A Well, Mr. Butler, was 66 when I examined him and his weight, of course, would—as I tell my patients, if I suddenly handed you 57 pounds today, and told you to carry this all day long, 24 hours a day, 7 [190] days a week, would you not feel as if you were tired out? Certainly, you would and you'd feel a bit more slowed down. And even though you gained the weight slowly doesn't make any difference, still it slows you down. And so, that would slow him down.

However, when I talked to him. Here's a man 66 years old, who is farming 108 acres, 34 beef cattle, a bull, a milk cow, 24 chickens, 2 dogs, 2 cats, grows hay for his cattle, for regular exercise he does calisthenics, range of motion exercises. That's pretty good for a 66 year old man. If I could get all my 66 year old patients to do all that much activity, I'd think they were doing pretty good. Now, I don't know what he did before that, maybe he farmed 216 acres and had 68 head of beef cattle, and so forth. Maybe that's what he means by slowing down, I don't know.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Butler's respiratory condition, or respiratory function contributes to any inability to carry out the daily activities of life?

A Yes, it does not.

MR. BAKER: I think that's all we have.

* * * *

TRIAL TRANSCRIPT
April 24, 1998

Renn Testimony

* * * *

[4] THE COURT: Go right ahead.

MR. BAKER: Yes, sir.

CROSS EXAMINATION

BY MR. RION:

Q: Good morning.

A: Good morning.

Q: Dr. Renn, I believe the day before yesterday we spent—you spent a couple of hours on direct talking about some general issues regarding asbestos; is that correct?

A: Yes.

Q: And then you spent some time talking about each individual gentleman involved in this case?

A: Yes.

Q: That's what I—I think I'm going to follow the same procedure this morning. I'm going to spend a little time with you talking about some general considerations, and then we'll go to the individuals.

The one thing that we discussed, both in your testimony and with Dr. Gaziano, was the criteria that a clinician like you would use in diagnosing asbestosis, and when I say a clinician, is it your understanding that would mean someone who uses x-rays and breathing [5] tests as opposed to a pathologist who might actually look at lung tissue?

A: Yes.

Q. Now, the criteria that was shown to everyone on your direct examination is just a summary of some criteria that appeared in the American Thoracic Society's 1986 paper on diagnosis of nonmalignant asbestos diseases?

A: Yes, that's correct.

Q: Can you see this from the way I've got it set up (indicating)?

A: Yes.

Q: I tried to sit it where everybody, including you, can see it. Maybe if I come down in here (indicating). Now, if we read along it says—or actually, it doesn't say up here (indicating), but, up here it says (indicating)—above this it would say, "It is necessary to have one and two." Do you recall that language?

A: That's correct.

Q: And that means if you're not exposed—necessary means you've got to have it, correct?

A: Yes.

Q: You've got to have the exposure and [6] you've got to have the latency, or else you can't have the disease?

A: That's correct.

Q: Then it goes on to way, "We regard the following a recognized value," and there are four areas listed here, chest x-ray, restriction on breathing test, diffusing capacity, and rales, which can sometimes be heard on physical exam, correct?

A: That's correct.

Q: Now, would you agree with me that this is not a—there's no formula for making this diagnosis, that what the clinician does is look, after you get past the exposure and latency, the clinician looks at each one of these findings and then exercises his clinical judgement to determine if asbestosis is present?

A: That's correct.

Q: So, it's not like you—you wouldn't say that you have to have—there's no formula where you can say you've got to have Number 1 and 3, you certainly don't have to have one, two, three and four to make the diagnosis, do you agree with that?

A: I agree with that. The only thing that, if you have all four it makes you more certain.

[7] Q: Right, and for example, we know that these are clinical tools as opposed to pathological tools, correct?

A: Yes.

Q: And, we know that asbestosis, in almost every case, will first exist, will it not, pathologically in the lung, and in the early stages it may exist in the lung but not be detectable, at all, by any of these tools, is that correct, early on?

A: That is correct.

Q: And, then, as times passes, the fibrosis may—I'm going down but really I may become more evident and eventually, at some point, it becomes clinically detectable, at least in some instances, correct?

A: Yes, and I use the analogy of pregnancy. In the early stage it is simply one egg and the sperm that found that egg, and then that egg divides into two cells, and then four cells, and some time it becomes clinically detectable, but before that it is not clinically detectable.

Q: And as it becomes clinically detectable, depending on the individual, different ones of these clinical tools may register a positive finding [8] first, depending on the individual?

A: They may register a positive finding. However, they're not—they don't have enough discriminatory power to be able to say that this is really caused by a specific disease process.

Q: With that explanation, though, you'd agree with me that as a person progresses from the pathological to the clinically detectable level, different ones of these may become positive first, depending on the individual?

A: That's correct.

Q: And, for example, you'd agree that asbestosis—

A: Excuse me, that's correct, with the exception of the crackles.

Q: Tends to be later?

A: The crackles come later.

Q: . Yes, sir. You agree with me that in some instances a person's asbestosis will progress to the point that it shows up on the chest x-ray, but he might not have any measurable impairment?

A: That's correct.

Q: So that person might have scarring that we can detect by x-ray but not have any impairment, and [9] he may not even have any symptoms?

A: That also is correct.

Q: So you can have the disease in it's early stage and have no symptoms at all?

A: Yes.

Q: Now, in other cases, and I think you'd agree with me, that the first noticeable change in some cases is an abnormality in gas exchange?

A: That's true. However, the abnormality is usually more evident as you're doing an exercise test with blood gases. The diffusing capacity has too much error and deviation from laboratory to laboratory to be that selective or discriminative.

Q: Yes, sir. The diffusing capacity is an indirect measure of the lung and gas exchange table, though?

A: That's correct.

Q: And you'd agree with me, although you would prefer an exercise test, that in some situations, not all situations, but in some situations you may have an individual with asbestos exposure and a latency who may have no chest x-ray changes, no restrictions, no rales, but who might have a gas exchange abnormality that you're able to pick up with the more sophisticated [10] tool of an exercise test, and that person may have asbestosis?

A: Well, that's true, but you also have to be certain that you are eliminating other compounding factors.

Q: Yes, sir, absolutely.

A: The other reasons for an exercise induced type test.

Q: Absolutely, but you'd agree that under some circumstances, if the clinician, after considering all that, in his professional judgement, may make a diagnosis of asbestos, but not in every case, but in certain cases where the only abnormalities are a history of exposure, latency, and some indication, not of diffusion but of gas exchange abnormality, that under certain situations can be appropriate?

A: It could be but it'd be very unusual without the x-ray.

Q: But you'd agree it can happen?

A: It'd be very unusual but it could happen.

Q: And that person may have normal x-ray, no restriction, and no rales?

A: That's correct.

[11] Q: Okay, and in other individuals, as we discussed, might have the history, the latency, and may have nothing but chest x-ray with no measurable impairment?

A: That's correct.

Q: So, again, I'm not trying to—this is general information that we're just covering here, that you'd agree under certain circumstances an individual might have—he might have the history of exposure, he might have latency, he might have chest x-ray, and he might have diffusion and rales, and not have restriction?

A: That, too, would be very unusual by the time he progressed to rales or crackles.

Q: Yes, sir, but let's say, well, he might have the x-ray, the history, and diffusion—x-ray—the history, x-ray and diffusion, for example?

A: That could be true.

Q: Yes, sir, okay. Although, certainly, diagnosis of asbestosis is possible without chest x-ray changes, the x-ray is a very important tool?

A: Yes, it is.

Q: And, I think the ATS statement says that you really need to be careful about diagnosing it [12] without the x-ray, unless you've got lung tissue?

A: That's correct.

Q: So,—and I think you indicated on your direct examination, although the ATS suggests the 1/1 chest x-ray, a 1/0 chest x-ray is, first of all, considered abnormal?

A: Yes.

Q: And under appropriate circumstances can—you can make a diagnosis of asbestosis with a 1/0 chest x-ray?

A: That's correct.

Q: Let's talk a little bit about pulmonary function testing, and I think you indicated that there are different—that when you're looking at whether someone is normal or abnormal in pulmonary function tests, what you do is you compare their score to tables that exist that provide what someone of a certain age should score to be normal?

A: That's correct.

Q: And, they don't have to—in order abnormal—they're not abnormal just because they're—just if normal's one hundred, scoring ninety-nine wouldn't necessarily—wouldn't be abnormal?

A: No.

[13] Q: You've got to be significantly below the predicted normal to be abnormal?

A: That's correct.

Q: And, the way they do the tables, Doctor, don't they do chest—whoever does the tables should do chest of healthy people and see how they score to set some norms?

A: That's correct.

Q: And, roughly speaking, the ninety-five percent of the studied population should fall within the normal range and five percent in the abnormal range?

A: Well, you're—what you're doing in the testing of these normal people—

Q: Yes, sir.

A: —is that you're looking at this—these normal—let's say you look at one hundred people and they are all normal by every method that you can possibly determine, they're x-

rays are normal, they have no history of lung disease, they've never smoked, they haven't worked in an occupation where they might get a disease, they're not overweight, et cetera. And after you determine that they're normal, then you take the test that you want to determine the normal predicted valued score and you administer that test to them, and [14] then use that for your comparison with people who are being tested to find out whether or not they are abnormal.

Out of that one hundred people that are normal by every other method, the test that you are trying to determine the predicted values for, there will be five percent of them that will fall outside of that and look abnormal when in reality they aren't, and that is with a number of tests. It's called the ninety-five percent confidence interval.

In other words, you can be ninety-five percent certain that if someone falls inside those numbers that you determine, then those people are definitely normal.

Q: So, you'd agree—I think your explanation—you explained in detail what they did, but I believe you would agree that the subject population that forms the basis of the predicted normals, ninety-five percent of that population will fall within the normal range and five percent within the abnormal range, roughly speaking?

A: That's correct.

Q: Now, we've had a little discussion about that, depending on which table you use for a particular pulmonary function test, whether it be for [15] vital capacity or diffusion capacity, a person may be rated as normal or abnormal, depending on which table you use to predict where he should be based on his age?

A: That's correct.

Q: You can have, on any of these predicted normal tables, you can have, can't you, Dr. Renn, people who we know have had significant loss of lung volume, for instance, through surgery, who, nonetheless, score normal on the

tables, although they may not be normal for them because we know they've had some lung removed?

A: That's correct.

Q: So you could have, for instance, I think we have, tell me if I'm wrong, the right-hand side where there's no heart, there's three lobes?

A: Yes.

Q: And on the left-hand side where there's your heart, you have two lobes of lung?

A: Yes.

Q: And you might have one lobe removed, surgically, on the right-hand side because of cancer or some other problem and take a pulmonary function test and still score as normal with no impairment?

A: That's correct.

Q: That's just an inherent limitation of [16] the tables?

A: Well, it's not a limitation of table so much as it is, when you remove part of the lung, surgically, the other parts of the lung will expand to fill up that space, and so, it's really a function, also, of that.

Q: But it's in part due to just the fact that we're dealing with predictions and populations rather than individuals, so, you can even have two lobes removed and still score normal, couldn't you?

A: Yes.

Q: And that would be significant loss of lung volume?

A: That's correct.

Q: From a pathological standpoint. I wanted to discuss this issue with you a minute, Doctor, and I've got a—can we have that Joe Provilla report?

And let me ask you, I doubt that you're going to be able to remember this, but, Doctor, there've been people that have run through your lab, for instance, and who've done pulmonary function tests, x-ray, and all the workup you've described here, who've scored completely normal on everything, you know, if we looked at the—we looked at

the—had a history of exposure, had [17] appropriate time interval, who might have a negative—no chest x-ray, no restriction, no diffusion and no rales, who we know have asbestosis because they've had surgery and there's been a biopsy that proves it to us, I mean, can you recall that that has happened in some instances?

A: That's correct.

Q: Yes, sir, and so, in those instances, for example, if we had, and again, I'm not trying to be unfair to you and tax your memory unduly, but you might even have had an individual that the reason we know he has asbestosis is he's had cancer, and he's had a section of his lung removed, yet all the clinical tests that you've run—don't get me wrong, I'm not inferring there's anything wrong with it, it's just a function of how this works, all the clinical tests that you run were normal but we know, Number 1, both the person has asbestosis and he's lost some lung volume because he's had surgery, can you recall that that's probably happened in some of these cases you and I've been involved in?

A: It has happened, and those are the examples of the people that have asbestosis before it's clinically detected.

[18] Q: Yes, sir, and they also even have—but they also even have some of their lung removed, and even that's not clinically detected?

A: That's correct.

Q: Now, in some of these gentlemen we have a finding of obstructive lung disease, which is something I think you and Dr. Gaziano both agree, where you see obstructive lung disease, the most common cause is cigarette smoking?

A: That's correct.

Q: And I think you and Dr. Gaziano have agreed in almost all these cases, I won't—they may be an exception, but in almost all of them, that where there's obstruction it's caused by cigarette smoking, at least in part, in these individuals, and in your opinion in whole, correct?

A: Yes, sir.

Q: Now, generally, when we think of asbestosis we think it may, on the one hand, it might cause a diminution in the diffusing capacity that we've discussed here, but it does not cause obstructive lung disease, generally, it's not regarded as causing obstructive lung disease?

A: That's correct.

[19] Q: On the other hand, you'd agree that there are researchers who believe that various types of inhalable dust, generally, not asbestos specifically, can cause or contribute to obstructive lung disease?

A: There are some dusts that can do that, yes.

Q: Do you agree that either coal or silica can contribute to obstructive lung disease?

A: Yes.

Q: I want to talk for a minute to you about what it—what the disease, asbestosis, means, and I think we've covered that you can have it originally with no shortness of breath at all?

A: That's correct.

Q: And would you agree that if a person begins to develop symptoms from asbestosis, the most common symptom would be shortness of breath?

A: That's correct.

Q: It's, in fact, some authors and researchers have said that it's one of these diseases that really almost has only one symptom?

A: That's true. As it becomes more advanced they develop a nonproductive cough, or a little hacking cough, possibly, as it becomes more advanced.

[20] Q: Yes, sir, but the primary and in some researchers, practically only significant symptom is shortness of breath?

A: That's true.

Q: Now, I want to talk to you a little bit, and if shortness of breath from asbestosis does progress you'd agree that it tends to be a very slow process?

A: Yes.

Q: It's not something that happened overnight or even over a period of a couple of months?

A: That's correct, because asbestosis doesn't progress very rapidly.

Q: It sort of, if it gets worse it's more likely to creep up on you than to get you suddenly?

A: That's correct.

Q: Now, on this issue of progression, uld you agree with me that asbestosis is normally a progressive disease?

A: If it is present it will progress, and it depends upon the dose that is present.

Q: Yes, sir.

A: It depends upon the time that it's been in relation to the tissue, but depending upon that, [21] those two factors, and it also depends upon the fiber type—

Q: Yes, sir.

A: —as to whether or not there is significant progression.

Q: But you'd agree, like, if you're teaching a group of medical students some of the primary features of asbestosis, you would probably put that it's generally a progressive disease, as part of the teachings you would give to somebody on the disease?

A: Well, if you say it's generally progressive, that would have to mean that it was progressive in all people, or at least greater than fifty percent of them, and that's not the percentages that I'm familiar with. The percentages are less than fifty percent.

Q: Would you agree it's normally a progressive disease?

A: Well, with that definition I can't agree that it's normally progressive.

Q: You can not?

A: Not if it doesn't exceed over half of the people.

Q: Yes, sir. I wanted to just—could we [22] look at Dr. Renn's testimony? You and I've discussed this issue, I believe, in a case called *Filmian versus Owens Corning*

Fiberglass, on October 27, 1989, and I just wanted to show you what we have.

If you could look with me, I asked you on Page 39, this was in '89, I think it was at your office up in Morgantown, I came up and talked to you, could you put the question and answer on the screen, and I think I asked you, "Doctor, I take it from what you said earlier that you believe asbestosis is normally a progressive disease," and your answer there was, "Yes," wasn't it?

A: That's correct. May I see that?

Q: Yes, sir. Yes, sir. Take a look at that. I don't want to try to get overly involved in semantics. Doctor, I think you and I can agree, asbestosis, in many cases, can be progressive, and it's very difficult to predict if and to the extent it will progress, is that something you and I can agree on?

A: Well, that's correct, but if we go back here in this deposition to the previous page—

Q: Yes, sir.

A: —we're talking about a person who retired with no evidence of asbestosis.

Q: Uh-huh.

[23] A: And a later time when the scaring become significant, and my answer was, then, "If he has at the time of his retirement over the period that he was exposed, he has then developed some dust spur. That dust spur is still present within the lung."

"The clearance mechanisms, or the normal clearance mechanisms of the lung have not been able to sweep the lung clean of the asbestos fibers. They then are reacted to by the body and whatever the body reaction is, then, to them, it will develop and progress over a period of years until it comes to the point where we can clinically detect the impairment and gas exchange, and the increase in elasticity."

Q: Uh-huh.

A: I should've said decrease in elasticity.

Q: Yes, sir. So what we're talking about there that, if I recall, and I was looking at that the other day, we were talking about there that if you have a person who he might, and you might want to refer back to the transcript previous page, we're talking about if he may work for, we'll just put decades, I believe this is what we're talking about and you tell me if I'm right, and he might retire, and when he retires, not [24] have detectable asbestosis, wasn't that what we were talking about there?

A: That's correct.

Q: All right. No asbestosis that we can see on check asbestosis. Yet, it could be sometime after his retirement he might come to the clinic and we detect it, right, isn't that what we were talking about?

A: That's correct.

Q: So, later he's asbestosis detected, sometime after retirement, and you agree that that can happen, didn't you, Number 1?

A: Yes, that can happen.

Q: And, then, after—go ahead, I'm sorry. I didn't mean to interrupt you.

A: In fact, the next question that was on—started on Page 38—

Q: Yes, sir.

A: —the question was, "So what you're saying is that the scarring may have been there when he retired but he hadn't progressed to a point where you can clinically detect it sometime after retirement?"

Q: Absolutely.

A: And the answer that I gave was, "It may not even have been there at the time of retirement. It [25] may only be that he had the dust burden at the time of retirement."

Q: Uh-huh.

A: "And it also may be that he is one of those susceptible individuals who would have dust burden and would then go

on and develop asbestosis. There are other individuals who have the dust burden and may not have that same susceptibility, and go on and develop—excuse me, and go on and develop the disease asbestosis."

Q: All right. So, with going through all that, and if we take an individual who's worked for decades and when he retires has no asbestosis, but he's got some dust in his lung?

A: Yes.

Q: And then later he develops asbestosis, after retirement, Number 1, you agree that can happen?

A: That can happen.

Q: And in the context of that discussion you did state that such disease, and it's the word you use and I don't want to—you did use the words, is normally progressive, within the confines of that discussion?

A: Within the confines of that discussion, [26] yes.

Q: Okay.

A: But when you use the word generally—

Q: Yes, sir.

A: —it's not generally because it's less than fifty percent.

Q: Yes, sir. Just in the confines of this discussion you'd agree normally progressive, my next question was to go through this that you'd discover for us. Thank you, ma'am. The—I wanted to just ask you a little question about a quote that OSHA said about asbestos and just ask you if you agree or disagree with—can I have a copy for Dr. Renn?

No, I'm sorry, I missed—'m wrong, you gave me what I needed and I'm confused on where I should be in my notes, I apologize to you and I apologize to these folks for getting mixed up here.

Now, you'd agree, would you, Dr. Renn, that as asbestosis progresses it can be fatal but is not necessarily in every case?

A: Sorry, I didn't hear the last part of your question.

Q: Would you agree that as asbestosis does progress it can be fatal but it is not necessarily fatal [27] in every case, is that a fair statement?

A: That's correct.

Q: Do you think it's fair to say that you would generally—

MR. ADKINS: I'm sorry, excuse me for a minute, what do you have on the screen over there?

MR. RION: Nothing right now, I don't think. I'm confusing everybody, I'm sorry.

BY MR. RION:

Q: Now, you would agree, would you not, that if we're just dealing with averages, that generally you would expect some loss of life expectancy with asbestosis?

A: Yes.

Q: Now, could I have the OSHA 22615 pages? Now, I wanted to ask you something about that OSHA. This is a—OSHA had held some hearings in 1986 on some regulations on asbestos, and let me just read him some of the statements they made and see if you agree that generally this is an accurate statement, that under health effects overview it says, "OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans that has asbestos exposure."

[28] "The diseases caused by asbestos exposure are life threatening or disabling. Among these diseases are lung cancer, cancer of the mesothelia lining of the pleura, and peritoneum gas asbestosis and gastrointestinal cancer."

"Of all the diseases caused by asbestos, lung cancer constitutes the greatest health risk for American Asbestos Worker. Lung cancer has been responsible for more than half of the excess mortality from asbestos exposure in some occupational cohorts."

Now, there's a lot of statements in here, I'm not going to try to ask you if you agree with this thing as a whole because there might be—let me ask, do you agree that the diseases caused by asbestos exposure, it says here are, and what did we just say, can be life threatening or disabling, fair enough?,

A: Yes.

Q: All right. It says, "Among these diseases are lung cancer, and I think you'd agree with that with a caveat—you'd believe asbestosis has to be necessary before lung cancer is a problem?

A: That's correct.

Q: Cancer of the mesothelia-lining of the pleura, you'd agree with that?

[29] A: Yes.

Q: And, peritoneum, you'd agree with that?

A: Yes.

Q: And asbestosis?

A: Yes.

Q: And you might not agree with them on gastrointestinal cancer?

A: That's correct.

Q: All right. You don't have to have asbestosis to get the mesothelioma, though, is that correct?

A: That is correct.

Q: In fact, it's one of them unfortunate things about asbestos exposure is that mesothelioma is probably the most serious—most serious disease and the one most likely to be fatal of all the asbestos diseases?

A: That's correct.

Q: But, yet, it takes less exposure to cause that than any of the others?

A: That's correct.

Q: In fact, it's even been reported in family members whose only exposure is washing the clothes of workers who had occupational exposure?

[30] A: That's correct.

Q: Now, it says here, of all the diseases caused by asbestosis, lung cancer constitutes the greatest health risk for American workers, it says lung cancer has been responsible for more than half of the excess mortality from asbestos exposure in some occupational cohorts. Now, if I add that those occupational cohorts include workers who, Number 1, had asbestosis, and Number 2, who were smokers, to be fair about this, you'd agree that that's an accurate statement, if we're talking about asbestotic smokers?

A: Yes.

Q: Okay. Now, if we're talking about people just—let's back up a minute about people who just smoke cigarettes who are not asbestos workers, then the lung cancer risk, and that's a pretty substantial lung cancer risk just from smoking?

A: Yes.

Q: And I think it's somewhere around ten percent on the average?

A: And, a little bit higher in some series.

Q: Ten to fifteen percent?

A: Yeah, that'd be fair.

[31] Q: From smoking alone?

A: Yes.

Q: So, if we want to—if we want to take a look at cancer risks in, let's talk a minute about asbestosis patients, if we tried to set up a little chart here, if we took—let's take mesothelioma and lung cancer, and we'll put total over here (indicating), and we're going to put asbestosis, let's put asbestosis patients, smoke, I'm going to put asbestosis who don't smoke, and then I'm just going to put smokers, no asbestos, and nonsmokers, no asbestos.

If we kind of move across here, the rates reported of mesothelioma among asbestosis patients, would you agree, one in the eight to ten percent range, or do you remember?

A: Well, the problem with the mesothelioma is that most of the patients that develop mesothelioma have not developed asbestosis.

Q: Uh-huh.

A: And so it's generally asbestos exposure and not asbestotics, per se.

Q: There's a couple of mortality studies, Doctor, on workers that we've talked about in this case, on workers diagnosed by pneumoconiosis panel with [32] asbestosis, we've got a couple here from—one from—you're familiar, I'm sure, with Dr. Raymond Parks?

A: Yes.

Q: And Dr. Couts from Britain, and then another one from Dr. Berry, again, a British study. Just taking a quick look at these, would you agree that they reported, I think, both of them, of the mortality of the people they looked at, of the deaths, somewhere around ten percent were from mesothelioma in these two cohorts?

A: Yes, nine and ten percent.

Q: All right, and that, assuming these studies are right, the mesothelioma risk does not vary depending on smoking history, smoking's not a contributing factor to mesothelioma?

A: That's correct.

Q: Okay.

A: Neither is asbestosis.

Q So,—

A: I don't think you can put in your chart, it's not asbestosis.

Q: Well, those studies there involve asbestosis patients, do they not?

A: Yes.

[33] Q: I'm going to put a star here and put reported—reported by Couts and Berry. I think the point you're making, I believe, Doctor, is that the rates that is, in your opinion, is not really the asbestosis that puts them at risk for mesothelioma, it's the fact that they've been exposed?

A: That's the point.

Q: That's the point you're making, okay. Well, with that caveat by putting reported by Couts and Berry, do you have any problem with me putting nine to ten in here?

A: No.

Q: Okay. Now, the big difference, and that's going to be smokers and nonsmokers, there shouldn't be any difference by smoking history?

A: That's correct.

Q: The big difference you're going to get is going to be when you get to lung cancer, because they report for their smokers—these are smokers and I'll represent to you that maybe not all, but almost all of these folks in these studies smoke, so I don't want to mislead you or anybody else, but among these cohorts, they report thirty-nine to forty percent for lung cancer?

[34] A: Yeah, they say thirty-nine percent, both of them.

Q: Okay. So, if you're—according to their cohorts, the folks that smoked and exposed to asbestos and have asbestosis, it's just like the OSHA, the OSHA said some of them are over fifty percent, these come out a little under fifty percent, for the smokers?

A: Yes.

Q: Around—actually they come, say, forty-eight. Now, on the other hand, if you never smoked your lung cancer risk from asbestos is dramatically lower, and in some peoples' opinion, eliminated?

A: That's correct.

Q: Yeah. Which do you—do you believe it's eliminated or do you believe it's dramatically lowered?

A: From exposure alone?

Q: No, from asbestosis?

A: No, I don't believe it's eliminated from asbestosis.

Q: Dr. Gaziano, I think, said somewhere around two-and-a-half percent, does that sound reasonable?

[35] A: That's correct.

Q: So you're still, if you add up the total risk, it's—the major risk of the nonsmoker is going to be mesothelioma as opposed to lung cancer?

A: That's correct.

Q: All right. So, and that'll be around eleven-and-a-half, total, if you take in lung cancer and mesothelioma?

A: Yes.

Q: Now, if you look down to smokers, no asbestos exposure, you're mesothelioma risk is going to be nil to zero?

A: Yeah, it's very rare.

Q: So, just—would you fair enough put point, something like this (indicating) ?

A: Yes.

Q: I mean, very near zero, and then lung cancer we're going to say ten to fifteen percent?

A: Yes.

Q: And then on these it's going to be less than one percent for both, right?

A: Yes.

Q: So, if we compare—kind of, if we compare smokers and smokers, the asbestosic patients are [36] going to have a lot higher risk than the folks who just smoke?

A: That's correct.

Q: And if we compare nonsmokers to smokers—excuse me, nonsmokers who have asbestosis to people who've got not smoking and no asbestos, again, the asbestosic population's going to have a lot higher risk?

A: Yes.

Q: Although, in an individual we're going to be unable to say any individual, with reasonable certainty, is going to get cancer?

A: That's correct.

Q: And that's what Dr. Gaziano said, he said he just couldn't say, and you'd agree with that?

A: Yes.

Q: I'm going to ask you some questions about tobacco. I'll assume that as a pulmonary doctor you're very much against smoking?

A: Yes, indeed.

Q: I think Dr. Gaziano said he's done a lot in this community to campaign against smoking. I assume you've taken some measures up in your community to do the same?

A: Yes.

[37] Q: You'd agree that one of the problems with tobacco and nicotine is that it is an addictive drug?

A: Yes, it is.

Q: And, some people can quit smoking?

A: That's correct. Some, yeah.

Q: And some cannot?

A: And some cannot.

Q: In fact, I believe you'd agree on the—when we talk about addictive drugs, it's right up there with, as far as difficulty in quittingness, right up there with heroine and cocaine or the works?

A: Well, I've never had to quit any of them, so, I don't know.

Q: I understand that. I mean, but what you know—not from what you know—you've never smoked either, I bet?

A: That's correct.

Q: But, from what you know as a scientist and doctor is what I meant here?

A: Yes.

Q: Okay, that was my—I wasn't meaning to infer that you smoked or done any of that. If we go back to our individual who worked for decades, retired [38] and had no asbestosis, and then it becomes detectable, and let's say he had exposure over decades doing different kinds of work, but most of it with pipe and boiler insulation we've been shown—you know what I mean when I say pipe and boiler insulation?

A: Yes.

Q: Everybody else does by now, too, but assuming someone's been exposed by environment to pipe and boiler insulation over decades, then they come to the clinic long after retirement and you diagnose asbestosis, would you agree that the entire burden of fibers breathed in over the career would all add to the fiber burden that ultimately results in the disease that's diagnosed?

A: Well, that would be true, but it would depend upon the length of time after retirement before it showed up, because, let's say there was a year after retirement and he had exposure in the previous year, that's too short a latency period for those fibers to have done anything.

Q: All right, let me—that's a good point. Let me be a little more concrete, if we take a guy whose exposure is say, nineteen—thirty to 1970, and he shows up in the clinic—and I'm just going to [39] pick a date, 1990, you'd agree that the cumulative exposures over these decades were all to the extent they were exposures, all contribute to what we end up with here in 1990, with the caveat that, you know, an exposure of two months would contribute less than an exposure of two years, I mean, from—we'd include that common sense qualification, would you agree?

A: Yes.

Q: Okay. Now, I'm moving toward trying to work into our individual cases, and I wanted to see if we could summarize a couple of what I perceive to be the differences between your results and Dr. Gaziano's and see if you could agree with me that two of, maybe not the only but, two of the major differences in your workups and his are obviously, you guys read the x-rays different?

A: Yes.

Q: And, then, second, you have different results on many of the individuals on diffusion capacities specifically because of the difference in predictive tables that you each use?

A: That's correct.

Q: Would you agree that we're talking about the same issue over and over on some of these [40] guys, those are initiatives that you might talk about in general to save time, particularly the diffusing capacity?

A: Yes.

Q: Okay. Now, on the diffusing capacity, I think, Dr. Gaziano uses Crapo and Morris, correct?

A: That's correct.

Q: And you use another table that gives different predictives?

A: Yes.

Q: And because of the difference in the predictives some of these folks under Dr. Gaziano's analysis and tables, might be abnormal, and under your analysis and tables might be normal?

A: That's correct.

Q: And it's not that—and he said that—he made statement [sic] in this courtroom he didn't think there was anything wrong with what you done in using your tables, would you agree the same with him?

A: I don't think there's anything wrong with the way his tables, the problem is the way he interprets them (inaudible) being that was set up by Crapo and Morris when they published their paper.

Q: Now, Dr. Crapo, who developed these [41] tables, is a respected scientist?

A: Yes, he is.

Q: And, these tables have been used very widely?

A: They are used widely, yes.

Q: Would you agree that they probably are more widely used than the one's you're now using?

A: I would say that they're more widely used. However, the reason that they're more widely used, again, is because a lot of the software companies, the equipment companies that sell the machines, give those standards with the machines that they give out.

Now, if you know what you're going to use as a prediction equation in your office, or in your hospital, or wherever the laboratory is, then you can have the software written by the company to give those prediction equations, and, in fact, in our laboratory, we use different sets of prediction equations because it's required by different entities to use those prediction equations that they want used for the testing procedure.

Q: Does some of them require Crapo and Morris?

A: Yes.

Q: So, depending on who requests, you may, [42] in fact, in some cases use Crapo and Morris?

A: That's correct.

Q: And, Dr. Crapo is a fairly renowned scientist in this area, is he not?

A: Yes, indeed.

Q: Now, the—you reference the 1986 American Thoracic Society paper on how to diagnose asbestosis?

A: Yes.

Q: And, in the same year the American Thoracic Society did a paper on how to evaluate permanent impairment?

A: Yes.

Q: And in that paper, did they not recommend Crapo and Morris for diffusing capacity?

A: I don't recall what they recommended in that particular paper.

Q: I think if you look, it's the American Thoracic Society Evaluation of Impairment Secondary to Respiratory—Evaluation of Impairment Disability Secondary to Respiratory Disorder, and didn't they—let me just refresh your recollection, on Page 1206, talking about the diffusion capacity, just take a quick look there a minute, I know you can't possibly memorize [43] all these papers, but didn't they say the regression equations of Crapo and Morris are recommended?

A: That's what they said in here.

Q: Yes, sir, and let's just—I may be confused on this, but when you look at these impairment tables that rate people on impairment, you're really looking at ability—usually they're really more designed for trying to measure ability to do work, that type of thing?

A: Yes.

Q: And, at least in the impairment tables, to the extent they have DLCO on there, you do look at the DLCO single breath rather than corrected when you're doing impairment ratings?

A: That's what you're—well, they just say look at the diffusing capacity, they don't say whether or not it should be the DL/BA or not.

Q: Yes, sir. That's left to the—well, you agree with me, just as an example, if we take the same—the person we're talking about who's, let's say, had a whole lung removed and only got one lung, if you adjust their DLCO for alveolar volume, it could very possibly be normal?

A: That's correct.

[44] Q: On the other hand, their DLCO uncorrected single breath would likely show some abnormality?

A: That's correct.

Q: The—don't the—are you familiar that the West Virginia—this case is legally—is an FELA case because there's no Worker's Comp. for railroad worker's, you understand that, generally, that this is—

A: I don't even know what—

Q: Yes, sir.

A: —it stands for.

Q: Well, I'm not trying to confuse this with a Worker's Comp. case. Would you agree with me that the West Virginia Worker's Comp. Board, when they send people to be evaluated at St. Francis for when they want pulmonary function tests, they use Crapo and Morris?

A: That's correct.

Q: And that includes—even, that includes all the workers, too, in their settings, they still use Crapo and Morris?

A: That's correct.

Q: And I think the American Medical [45] Association Guidelines for Permanent Impairment also have published in their regression equations of Crapo and Morris for DLCO?

A: Well, that's true, but only if the laboratory that's doing the testing is doing the testing according to the American Thoracic Society recommendations for testing?

Q: Yes, sir.

A: If they're not doing the American Thoracic Society recommendations for testing and they recommend that the laboratory establish the prediction equation, the one that best fits the population they're testing.

Q: You're talking about some time in the, oh gosh, in the—at some point the American Thoracic Society came out in the paper saying, you know, look, you need to do what you-all did, run some people through your laboratory and see how it fits?

A: Well, that was done by Dr. Crapo several times, because he actually chairs the committee. He never recommended his own prediction equation.

Q: He said you need to run people through your lab to see what works?

A: That's exactly right.

[46] Q: And that—

A: He said that many times, in many editorials, and many papers, which, if you're interested I brought them with me, and I can—

Q: No, I think that's something we agree on, that they made that recommendation, in fact, you know Dr. Gaziano's partner, Dr.—not partner but the gentleman who shares the office and pulmonary function lab with Dr. Gaziano, Dr. Zaldivar?

A: Dr. George Zaldivar.

Q: And Dr. Zaldivar does examinations for the defense in asbestos cases?

A: I don't know who he does examinations for.

Q: Yeah.

A: I just know he does examinations.

Q: Dr. Gaziano testified that he and Dr. Zaldivar did what the ATS told him to do, which is run people through the lab and see if they fit the normal for people around here. I mean, that doesn't surprise you that they did that, also, does it?

A: Well, I've never talked to Dr. Zaldivar, so I don't know if he did or not.

Q: Yeah. Well, Dr. Gaziano testified they [47] did the same thing that you did?

A: I don't know. I don't know. I guess, if he says he did, he says they did.

Q: And so I asked him, "So you and Dr. Zaldivar ran people through your lab using Crapo and Morris or some other paper actually perfected this ninety-five percent," and his answer was, "Yes, sir." So, I mean, it sounds like he did the same type of things you did.

A: Does he say how many people?

Q: It says several. I don't know. He didn't give the number.

A: Because they're very specific, the American Thoracic Society's very specific about the number that has to be done.

Q: Yes, sir. Well, it appears they made some attempt, from his testimony, to not just use Crapo and Morris, but to run some people through there and see how it fit?

A: Well, they made an attempt, but they didn't make a valid attempt.

Q: Nonetheless, the West Virginia Comp. Board still uses Crapo and Morris?

A: That's correct.

[48] Q: And if you look in the ATS or AMA Guidelines Crapo and Morris is in there?

A: Unless you're not using the ATS recommendation for these standard tests.

Q: Yes, sir. So, I mean, the—the whole point I'm making is Crapo and Morris is not out of the mainstream?

A: Well, if we look at Dr. Crapo's paper where the guidelines were established—the predicted equations were established in the paper in 1981.

Q: Uh-huh.

A: The first paragraph under discussion reads, "The DLCO and DL/VA predicted by our regression equations were higher than other reported values for men and were among the higher reported values for women." So, it's not mainstream or midline, they are the highest predicted equations of all in the United States?

Q: Yes, sir.

A: Or throughout the world for that matter. So, are they correct at being the highest, is everyone else wrong, I don't know if they're correct or not, but no one who is reasonable, and this includes Dr. Crapo, because he chairs the ATS committee on the diffusing capacity, no one who's reasonable knows for [49] certain who is correct.

Q: But if we look into the ATS's most recent statement on the guidelines they say they—they don't just print Crapo and Morris, they say it's recommended?

A: Well, you say the most recent?

Q: The most recent paper they done on evaluation of impairment disability secondary to respiratory disorders?

A: Well, but that paper is in 1986 and the American Thoracic Society has an official statement that's been published since then, Mild Impairment, plus they published an official statement on the single breath carbon monoxide—

Q: Yes.

A: —diffusing capacity, which was in 199—excuse me, 1995.

Q: And that's the one that says you need to run people through the lab?

A: That's correct.

Q: Okay, but as far as the one that's secondary as far as the statement on evaluation of impairment secondary to respiratory disorders, this is their latest consensus paper on that issue?

[50] A: Yes, it is, but most disregard that now because of the later statements that have been made.

Q: But it says the regression equations of Crapo and Morris are recommended?

A: That's correct. It says that in 1986.

Q: And the 1995 AMA Guidelines still uses Crapo and Morris?

A: That's correct.

Q: And in 1998, the West Virginia Comp. Board still uses the Crapo and Morris?

A: That's correct.

Q: And that's right here in this area?

A: Yes.

Q: And it involves evaluation of a lot of older workers for pneumoconiosis?

A: But we have to also recognize that the Comp. Board is not strictly medical.

Q: Yes, sir.

A: The Comp. Board has legislative guidelines they have to go by, they have been given guidelines by the legislature, and these are not medical guidelines that they've been given.

Q: Yes, sir.

A: They have been legal guidelines that [51] they have been given.

Q: Right. I've got a brief history you told us you were going to decide for us yesterday that we never decided. It might be a reasonable time to take a break.

THE COURT: Okay, go ahead, we'll take the a few minutes.

(WHEREUPON, a recess was taken, after which the following proceedings were had.)

THE COURT: Go ahead.

BY MR. RION:

Q: My next question was diffusing capacity issues. Do you know Dr. Rasmussen from up in Beckley?

A: Yes, I know him.

Q: Do you know whether he uses Crapo and Morris?

A: I have no idea.

Q: You just don't know one way or the other?

A: No.

Q: How about the—and I may have the name wrong, the Appalachian Laboratory up in Beckley?

A: I know that's the laboratory he uses [52] but I don't know what they use.

Q: Okay. Are you familiar with the concept—let me back up a minute, Doctor, you'd agree that if somebody has obstruction from smoking, it can actually, in some instances, increase their total lung capacity?

A: Yes.

Q: It can, not always, but it can make it go up, and that's not a good thing, it's due to increased dead air space?

A: Yes.

Q: Roughly speaking, and on the other hand, asbestos disease can cause restriction, correct?

A: That's correct.

Q: And it can, although it doesn't always, but it can make your total lung capacity go down?

A: That's correct.

Q: And there's some indication in the literature that you see, in some instances, that you may see asbestos exposed workers who smoke cigarettes who have—may have preserved normal total lung capacity because of combined obstruction and restriction pulling in opposite directions,

that's something that's been discussed in the literature, hasn't it?

[53] A: Yes.

Q: Okay. You and Dr. Gaziano, as far as you know, are both B-readers?

A: Yes, sir.

Q: Did—you've been certified for how long?

A: Since 1981.

Q: Since '81. Have you published any articles on asbestos disease?

A: No, sir.

Q: In—have you seen Dr. Gaziano's reports?

A: Yes.

Q: And just you and he just have reported differences in how you read these men?

A: Yes, sir.

Q: Now, you'd agree asbestosis is an interstitial lung disease?

A: That's correct.

Q: And it can cause an increase in interstitial markings?

A: Yes. Now, you have to remember that it's one of about two hundred interstitial lung diseases.

[54] Q: Yes, sir, and—but I believe the ATS statement we've looked at says that if you have a diffuse pattern of interstitial fibrosis on a chest xray, and asbestos exposure, then what they say is you can presume the changes are due to asbestos because other forms of interstitial fibrosis are "comparatively rare." That—that's—is that what they say?

A: That's true, provided you can eliminate other compounding diseases that can cause that.

Q: Which study calls that?

THE COURT: Let him finish the answer.

BY MR. RION:

Q: I'm sorry. Go ahead, I'm sorry. I didn't mean to interrupt you.

A: I just said provided that you can eliminate other compounded diseases that may ____ at any time.

Q: I wanted to look for a second at the quote from the ATS statement that we just talked about, and I think this is—I'm not disagreeing with what you said, I think this sort of just states, in summary, what—no, up one, down, up, there you go.

It says, if you read along with, "Given a clear history of exposure to asbestos, a diffused [55] interstitial fibrosis can be presumed to be due to the asbestos," are you along with me, right about the conclusion, I'm sorry, right along in here (indicating), "However, given . . . ," yeah, "However, given a clear history of exposure to asbestos, a diffuse interstitial fibrosis can be presumed to be due to the asbestos as other forms of interstitial fibrosis are relatively uncommon."

"The prevalence of lesser degrees of interstitial fibrosis is not well known and considerable caution has to be exercised in attempting to attribute in all such phenomenon of asbestos exposure, either known or ____," and I think from what you just said earlier, you essentially agree with this statement?

A: Well, yes, and then, what I said, also, is contained in the first part of that paragraph, which reads, "A major problem exists in the differential diagnosis when more than one disease is present, whether it is congestive heart failure, COPD, or aquatic lung disease. There are diseases unrelated to asbestos exposure but with similar symptoms, and these may occur in some persons with asbestos exposure."

Q: Then they go on and read, "But given a clear history of exposure—"

[56] A: Yes, that's what you read.

Q: Okay, thank you. The—would you agree that although cigarette smoking can cause some changes that you might see on the chest x-ray, a trained B-reader can tell the difference between dust disease and those changes?

A: Well, that's—the x-ray, that's the problem with the x-ray because there's so many other factors that I draw the statement that is in—you referred to Parks earlier?

Q: Yes, sir.

A: On occupational lung disorders. This is from the Third Edition of Parks. It's on Page 435, and it is in the second column, the first—or the second full paragraph, and it says, "The differential diagnose of small irregular opacities must be clear to ancient cigarette smoking."

"The radiological effects of which are discussed in the next section. Crowding of the vascular lung basis due to poor inspiration," and, of course, we have a perfect example of that in Mr. Spangler. It's not poor instillation, it's because of the bullous disease, it's crowding the lung basis, "and obesity," which I mentioned before can confuse people with the x- [57] ray diagnosis.

"These are all conditions liable to lead to a mistaken diagnosis of asbestos related disease, and similar small opacities may arise from a number of other unrelated diseases," and then it says, "An independent reevaluation by three expert radiologists who in reading graphs of 439 subjects suspected in one survey of having asbestos related disease, found valid radiographic evidence of only eleven, which was two-and-a-half percent."

So, it is—there are a lot of compounding factors in reading the x-ray, and that's why I said that it's difficult to train someone in a very short period of time to read those x-rays. There are so many other factors that have to be taken into consideration.

For instance, when you put up the standard films the other day and compared those, those are people with—who have been considered to be quality I films. The technique from quality film could deteriorate to detract a reader.

Also, those films were not in people who were obese. They were in people who were nonsmokers, and so forth, and they were considered to be the best possible example, but we don't deal with the best possible [58] example in the real world.

We have to deal with the x-rays of people that are overweight, or tobacco smokers, or heart failure, have had pneumonia.

Q: Would you agree, in persons exposed to asbestos, that asbestos is the predominant or main cause of interstitial fibrosis in those people?

A: That's correct, because diffuse interstitial pulmonary fibrosis otherwise is a rare disease.

Q: Yes, sir. I wanted just to show you, and I'm sure you're familiar, we'll show the members of the jury, what the surgeon general had to say about this, and you're familiar with a book published in '85 on the health consequences of smoking, cancer, and chronic lung disease in the work place?

A: Yes.

Q: A little blue book that's sometimes called—on Page 270, there's some information about that under paragraph six, there. Could we show that? It says, "Asbestos exposure is the predominant cause of interstitial fibrosis in populations with substantial asbestos exposure."

"Cigarette smokers do have a slightly higher [59] prevalence of chest radiographs interpreted as interstitial fibrosis than nonsmokers, but neither the frequency of these changes, nor the severity of the changes, approaches levels unfound in populations with substantial asbestos exposure." Would you generally agree with that statement as a whole?

A: Well, I do but it's talking about populations with substantial asbestos exposure.

Q: Yes, sir.

A: And they're talking about minors and millers and insulators and people that really are exposed very heavily.

Q: Yes, sir. They would agree with the quote, though?

A: Yes.

Q: Okay. I want to talk just a little bit to you, Dr. Renn, about your consulting work that you've done for law firms and corporations. You've set up a separable—assortable separate corporation for your work related in such matters, is that correct?

A: Well, yes, but it's not for me alone.

Q: You and—do you have a partner in it?

A: Yes.

Q: One partner?

[60] A: Yes.

Q: And what's the name of the corporation?

A: It's Environmental Occupational Exposure Consultants.

Q: And it's within that corporation that you do work like this where you examine workers and legal work, that type of thing?

A: Yes, but it's not exclusively legal work because we do pre-employment evaluations for companies. We do pre-employment for Mylan Pharmaceutical, for instance up in Morgantown. We do that for examinations, annual examination for the Department of Energy, NIOSH.

We do them for coal companies, pre-employment. We do pre and post work exposures for asbestos workers who are—well, not asbestos workers but asbestos removal workers.

Q: You mentioned on direct examination a figure, and I think I remember the figure but I'm not quite sure I remember what it related to. You mentioned a figure of billing of somewhere around 1.8 or 1.9 million total, for something, do you recall that on your direct?

A: That's since the beginning of the time [61] that I first became involved in asbestos litigation, which is somewhere, I forgot.

Q: Ten years ago?

A: '86, '87, something like that.

Q: Ten or eleven years ago?

A: Yes.

Q: And, that 1.8 million for work—medical, legal work in asbestos cases, was that what the figure related to over that period of time?

A: That's correct.

Q: And, you mentioned you've done some work at the request of lawyers representing plaintiff's, including Mr. Humphrey's firm, on a few occasions?

A: There were more than a few.

Q: Yeah. If you were to take this 1.8 million and say—would you agree with me, probably, at least 1.5 million of that comes from work done for either defendants or law firms representing defendants?

A: I would agree with that.

Q: Okay. Maybe a little more in one point in time?

A: Well, I don't know.

Q: Would 1.5 be a good estimate?

A: That'd be good.

[62] Q: Okay, for defendants. So, the vast majority of work you've done has been for defendants, although you've done some for plaintiffs?

A: That's correct. I don't turn away anyone. Anyone who requests the work I'll do it for them.

Q: Now, would you also agree with me that of the workers who've been sent to you for asbestos evaluations, you've, in some instances, diagnosed asbestosis?

A: Yes, sir.

Q: But you'd agree with me that in the vast majority of the cases you have found no asbestos disease?

A: Well, I don't keep the records like that.

Q: Just from your recollection, I'm asking you?

A: See, a lot of cases that they come out of Baltimore that seem like they're all mesothelioma cases.

Q: Yes, sir.

A: So, if I have to say restricted to Baltimore, than I'd be saying that the vast majority [63] have an asbestos related disease.

Q: Let me back up, then, let's say out of the workers who don't have cancer who you have been sent through your lab for pulmonary function tests and x-rays, who you are personally examining for asbestosis, would you agree with me that you, in the majority of those cases, do not find asbestos disease?

A: It depends upon the work they did. I had a series of insulators come in that I found the majority of them did have asbestos disease.

Q: I'm just talking about—oh, I'm sorry, go ahead. I didn't mean to interrupt you.

A: In, if we took another series of, for instance, there were some cable pullers that were down here in Charleston that were examined for asbestos disease and I found none of them to have any asbestos disease. So, it's a wide range depending upon what actually they'd done and how much exposure they've had.

Q: But if we take all of the workers you've examined over these ten years, would you agree with me that in more than half the cases you've probably found no asbestos disease?

A: I would agree—actually, I don't know. I really don't know.

[64] Q: Yes, sir, and this is not the first time you've seen cases for railroads?

A: That's correct.

Q: You've done that probably during most of the ten years you've been doing this?

A: No, sir.

Q: How long have you been doing them?

A: I'd say it probably five, maybe six. I can't remember exactly.

Q: Yes, sir, and in addition to the N&W you've seen them for the CSX?

A: Well, I'm sure I have. I don't keep track of which railroad it is.

Q: And the Burlington Northern?

A: I don't know. Again, I don't keep track of the railroad.

Q: Have you ever testified that you've seen cases for CSX and the Burlington Northern?

A: I would guess that's true, but I don't—I just don't recall.

Q: Yes, sir, but you agree you have testified under oath that you've seen cases before?

A: I probably have, yes, sir.

Q: Okay, and you've gone down—can you [65] tell us what the National Association of Railroad Trial Counsel is?

A: I imagine they're—I don't know for sure, but I guess they're people that work for the railroads and do the—

Q: Try cases?

A: —and try cases.

Q: Yes, sir, and you've gone down to give a talk to the National Association of Railroad Trial Counsel, haven't you?

A: I guess, if that's who they were.

Q: Yes, sir. Let me see if I can refresh your recollection on that, could I have the 11-27, 28 deposition of trial testimony? Doctor, do you remember the case of *Clyde Surbaugh versus CSX Transportation*?

A: I think so.

Q: That was up in Berkeley County, West Virginia, November 27 and 28, 1995, does that help refresh your recollection?

A: I believe so, yes.

Q: And the Judge's name was Thomas Steptoe?

A: Yes, that was the name when I was growing up. Yes, that's where I grew up.

[66] Q: Does that help refresh that you might have been there?

A: That's right.

Q: Yes, sir. Okay, and you were asked on Page 129, Line 20, "A couple of years ago or within the last couple of years, you spoke to the National Association of Railroad Trial Counsel in Miami, do you recall that," and your answer then was, "Yes," in '95, does that help refresh your recollection?

A: Yes, I probably did. I just don't know who they were.

Q: All right.

A: Actually, I didn't speak, it was—they sort of had a mock trial thing.

Q: Where they were practicing trying these cases?

A: Yeah, they used me as an expert witness.

Q: Yeah, okay. So the Railroad Trial Counsel, then, is similar to what Mr. Lafferty, who was representing the railroad, was doing, is that correct, you said the Railroad Trial Counsel would be people who try cases for the railroad?

A: Yes, sir.

[67] Q: Okay, and I think you indicated in the same trial there that you've seen cases for hundreds of firms in about ten different states?

A: Yes, sir.

Q: And, all—

A: That's not all railroad workers.

Q: Yes, oh, I'm talking about—

A: All types of respiratory injurious substances that could possibly cause a disease process.

Q: And that's in about—but you'd agree hundreds of different law firms in about ten different states?

A: Yes.

Q: All right, and all of your appearances in jury trials in asbestos cases have been at the request of defendants, haven't they?

A: Yes, sir.

Q: You also work in black lung cases?

A: Yes, sir.

Q: I think you've indicated that's primarily for lawyers who represent the coal companies?

A: That's correct.

Q: And you've done work in diesel fume cases also?

[68] A: A few. Very few.

Q: And that's primarily either for a coal company—for lawyers representing the coal companies or railroads?

A: Yes, sir.

Q: And, that's all I have. Let's talk about each case, individually, now, and I've got them—actually, I've got them in the order that I had my notes in when I started going through this. Mr. Vance being the first case. I'm sorry, do you got your file on Mr. Vance?

A: Yes, I do.

Q: I think you interviewed Mr. Vance and talked to him about his exposure history and determined that he did have the history of exposure and the latency that was required by the ATS?

A: Yes, sir.

Q: Mr. Vance had a relatively substantial smoking history, did he not?

A: Yes. He had a range of forty-seven to seventy-one pack history. Yes, sir.

Q: On the other hand, it appears, does it not, that he's simply one of these individuals who has not developed any significant impairing respiratory [69] impairment from his cigarette smoking, would you agree with me on that?

A: Yes, it's not something I tell my patients.

Q: Well, I understanding [sic].

A: Because only, of those who smoke, the ones who develop obstructive lung disease, there'll only be about one-fifth that will develop obstructive lung disease, the other eighty percent do not develop obstructive lung disease, but they're still at risk for other diseases like lung cancer, that

we've talked about, heart disease, cancer of the urinary bladder, and so forth.

Q: But he's apparently quit smoking?

A: Yes.

Q: And he's—is one of those lucky individuals who didn't develop any significant lung impairment from smoking?

A: That is correct.

Q: Okay, thank you. He has a controlled hypertension, I think you indicated in your records?

A: Well, it's not really controlled, it's inadequately controlled.

Q: Yes, sir. Okay, well, his—some of [70] the records from his treating physicians indicate that they believe that his cardiac problems are not what's causing any shortness of breath that he's experiencing, is that correct?

A: I don't even know that he has any cardiac problems.

Q: Well, I wanted to—

A: Unless you're talking about the high blood pressure. The high blood pressure's not really considered a heart problem, it's a cardiovascular problem.

Q: Yes, sir, but whatever cardiovascular—his treating physicians have indicated that they don't believe his cardiovascular problems are causing shortness of breath or do you have anything on that?

A: Well, I don't have anything on that but—

Q: Do you agree?

A: I would agree.

Q: Could we look at the 10-24-97 electrocardiogram that is in evidence already, do you have it up there, the whole—I can be able to hand to Dr. Renn? This has been previously admitted. Well, it's in evidence as 10-24-97 Scherer Heart Center [71] electrocardiogram, and I want to give you a complete copy of that, Doctor.

Look through it for just a minute. This is Exhibit 5 that's already in evidence. Just generally looking through that,

Doctor, have you read enough to see that he was complaining of some shortness of breath?

A: That's the reason he had the test performed.

Q: Yes, sir.

A: Shortness of breath and chest pain with exertion.

Q: Yes, sir. I wanted to go to the last page and just ask you to read along with me. I've got your last page—I may have your last page. It says, "His echocardiogram was also normal. I do not find any evidence of coronary disease and I think that his dyspnea," and dyspnea means shortness of breath?

A: Yes. It means increased work of breathing.

Q: ". . . . is related to pulmonary disease, and therefore pulmonary function studies were done and showed—this does show moderate restriction lung disease most likely due to—related to exposure to asbestosis in the past," and what I wanted to ask you, [72] Doctor, when you did your—in this case, you did a report—first of all, I take it, you certainly—you indicated that you disagree with the diagnosis of asbestosis?

A: Yes, sir.

Q: When you—when you did your report in this case you wrote a report with a letter to the lawyers who retained you, did you not, do you have your report that you wrote in this case?

A: Yes, I have my report.

Q: And I think in your report, did you have a list of—you had some historical medical records available to you when you wrote your report, correct?

A: Yes.

Q: And I believe this was not one of the records you had at the time you wrote your report, is that correct?

A: That's correct. It's not in the list.

Q: Yes, sir. If—we talked a little bit about cancer risks earlier, and although you think Mr. Vance does not have asbestosis, you'd agree with me, would you not that he—

because he's got asbestos [73] exposure that he would be at an increased risk for mesothelioma?

A: Well, let's back up one—

Q: Yes, sir.

A: —before we get there.

Q: Yes, sir.

A: Because this summary sheet or progress note that you read from is 10-24-97.

Q: Yes, sir.

A: And, the echocardiogram that Dr. Shear refers to is reported—he says it's normal here, and yet, when you read it it was not normal.

Q: Uh-huh.

A: He says that this is a normal echocardiogram stress test with no evidence of asemia, hypertensive blood pressure response to stress, so it's not strictly a normal test—

Q: Uh-huh.

A: —because you've got a hypertensive response, which was my point about his hypertension being inadequately controlled.

Q: Yes, sir. On the other hand, you'd agree it didn't show—as you made the distinction between hypertension and cardiac disease, didn't show [74] any cardiac disease?

A: That is correct.

Q: Okay. Is that all you have on that?

A: Yes.

Q: Well, going back to or finishing up, you'd agree that because of his asbestos exposure, Mr. Vance has an increased risk of mesothelioma?

A: Yes.

Q: Let's talk for a minute about Mr. Butler. Do you got your file on him?

A: Yes, I do.

Q: Mr. Butler you also talked to about his dust exposure history?

A: Yes.

Q: And found that he did have a history exposure and that he had sufficient latency past?

A: Yes.

Q: Your records indicate that he quit smoking in the mid '60's?

A: I said 1960.

Q: 1960, I thought it was '65, but, anyway, you'd agree that there was no lung impairment that you would relate to his smoking?

A: Yes, sir. That's correct.

[75] Q: You indicated that—you marked on the ILO form that there's a place where they ask, "Are there any pleural," and that means lining of the lung, does it not?

A: Yes.

Q: ". . . pleural changes consistent with pneumoconiosis," and I think on that particular form, did you mark yes on that question?

A: Yes.

Q: So he had some pleural changes on the lining of his lung, as I recall that you said looked consistent with what you'd expect on the form with the finding consistent with pneumoconiosis, but you had some question about whether it could be due to that?

A: That's correct.

Q: But as far as, you have to put a yes or no on the form, and on the form you did put a yes?

A: That's correct.

Q: And, assuming for a minute that we assumed that this is due to asbestos, you indicated that determinology would not be to call this asbestosis?

A: That's correct.

Q: Do you recall that—we probably can agree that it was an asbestos—if it is an asbestos [76] pleural change, one neutral way to characterize it that everybody could agree to would be asbestos related pleural changes?

A: Yes.

Q: And you'd agree that from a pathological standpoint an asbestos related pleural change is an injury to tissue?

A: Yes.

Q: Now, there's some—you'd agree, would you not, that at least in the earlier stages, the fibrosis—interstitial fibrosis in asbestosis often is more predominant in the basis of the lungs?

A: Well, not often is, it is.

Q: Always, good. The basis just means the lower part?

A: Yes.

Q: All right. So, I wanted to show you—so you'd expect in early—in asbestosis to see interstitial fibrosis down in the lower part of the basis of the lung?

A: Yes.

Q: I wanted to show you an x-ray report dated 9-9-90 on Mr. Butler. Do we have a copy for Dr. Renn, please? This is—I don't believe this is— [77] let me—maybe I've got the wrong date, could we try 4-13-93? I'll tell you what, we'll read—put the thing up and we'll read the whole thing, Doctor.

This is 9-90—excuse me, 4-13-93, is the date. It says, "No significant interval changes has occurred in the appearance of the chest which demonstrates underlying changes of COPD, mild basilar fibrotic changes, and left ventricular prominence."

"There are no superimposed _____, pleural abusions, atelectases, pneumothorax, or CHF. Mild osteoporosis and," how do you pronounce that next word?

A: Cytosis.

Q: ". . . cytosis are present in the thoracic spine. Impression portable chest without acute cardiac or pulmonary disease," and it says, "underlying chronic obstructive pulmonary disease, basilar interstitial fibrosis, calcified lymph nodes from prior granulomatosis disease and left intraocular prominence."

You'd agree—although in this case you'd disagree that there's x-ray evidence of asbestosis to make things clear, right?

A: Well, I disagree with that also. I disagree with the fact that there's chronic obstructive pulmonary disease.

[78] Q: Yes, sir, but—

A: And this is also a portable chest x-ray which seriously deteriorates the quality of the x-ray and should not be read—a B-reader shouldn't perform a reading on a portable x-ray.

Q: But it, nonetheless, it makes a finding of basilar interstitial fibrosis?

A: He does, but then, because he made the finding of COPD, or chronic obstructive pulmonary disease, I'd suspect what he's really reading there.

Q: But, nonetheless, if the finding is correct it is the type of x-ray finding that basilar interstitial fibrosis is the type of finding one would expect with asbestosis, subject to the qualifications you've made about this particular situation?

A: That's correct.

Q: Fair enough?

A: Yeah.

Q: Now, you, again, in this particular case, did a report to the lawyers representing the railroad when you finished your review and evaluation?

A: Yes, sir.

Q: And, did you—and you had some medical records available then?

[79] A: Yes.

Q: And was this x-ray report one of the medical records you had available when you did your report?

A: No, sir.

Q: Okay. Now, you'd again agree with Mr. Butler that because of his asbestos exposure, he has some risk of the cancer mesothelioma?

A: Yes, sir.

Q: All right. Let's talk about Mr. Shirley next. Ready?

A: Yes.

Q: You took a history of dust exposure with Mr. Shirley also?

A: Yes.

Q: And after talking to him you decided he did have the history of exposure and enough time had passed that the latency was satisfied?

A: Well, not after talking with him. I mean, if a person comes in and tells me that they have been exposed to asbestos, I'm not in any position to judge whether they have or have not?

Q: Yes, sir.

A: And so I accept it, and then set it out [80] determining whether or not they have actually developed the disease process that is consistent with their exposure to asbestos that they say they've had, but, likewise, I take the whole work history from the time they left school, because I'm interested in all the possible exposures that could've possibly effected their respiratory system.

Q: But you also make sure that, if they describe the history of exposure, that there's sufficient latency to have passed to satisfy that requirement?

A: Yes, that I do.

Q: And he did satisfy that requirement?

A: Yes.

Q: All right, and Mr. Shirley is someone who, for all practical purposes, never smoked?

A: That's correct.

Q: And there was no respiratory impairment from smoking in his case because he—the only smoking he'd had maybe had been trying a cigarette as a kid?

A: Yes, sir.

Q: And he did show—he did show some decrease on the diffusing capacity on the single breath?

A: Yes, he did.

[81] Q: And, again, as far as measuring impairment, if there's been a loss of lung volume the DLCO single breath is a tool that has some significance in measuring gas exchange impairment under some circumstances, it's not a meaningless figure is it?

A: No, it's not meaningless.

Q: Now, there was also a 1995 film that you looked at, that when you looked at the '95 film and were asked the question, "Are there any x-ray changes consistent with pneumoconiosis or dust disease when you originally saw the film," you did check yes but then filled in some comments in the comment section, is that correct?

A: Yes. There were a number of x-rays in '95.

Q: So, if the '95 x-rays showed some suspicion of fibrosis but you were thinking it could be due to other causes?

A: That's correct.

Q: And you felt like because, in your opinion, the later films didn't show the same changes, you decided it wasn't asbestos?

A: Asbestos doesn't disappear.

Q: Now, if Mr. Shirley had, when he was in [82] the hospital then, had a pneumothorax, did you have the records on that?

A: Yes.

Q: And if we—

A: Yes.

Q: Yes, sir. It would appear to you that he recovered from that?

A: Yes.

Q: Okay. Now, you also heard, when you put the stethoscope to his lungs, you did hear some form of crackles, correct?

A: I believe he was the person—yes, he was. They were on the right side only and they somewhat disappeared after he gave a deep cough.

Q: So you and I could agree on this one, crackles are a finding that if they meet certain criteria, can help support a diagnosis of asbestosis, Number One?

A: That's correct.

Q: And in this case, you heard some crackles, but in your judgement you didn't think they were the type in nature that would support a diagnosis?

A: Well, that's because they should not disappear after a deep cough, and they should be on both [83] sides.

Q: On the other hand, Dr. Gaziano's records reflect that he heard bilateral crackles, and I guess that just depends on what you hear?

A: I guess that's why.

Q: I mean, he said the same thing. I asked him about, you know, how do you explain the difference and he said, you know, I hear what I hear and I assume Dr. Renn hears what he hears and that's all he would say. So, if we, I mean, if we look at the ATS findings on Mr. Shirley, we'd agree he's got the history of exposure and the latency?

A: Yes.

Q: On the x-ray, there are x-ray findings that you'd agree earlier on looked consistent, but because of changes you perceived later you decided would not support a diagnosis?

A: Well, and that's what I stated on that same issue under comments.

Q: Yes, sir. I asked that. That is correct, isn't it?

A: Yes.

Q: And he's got a diminishment in his single breath diffusing capacity but he corrects the [84] normal for alveolus volume?

A: That's correct.

Q: And he's got crackles, but they're, in your opinion, one-sided, so not consistent with asbestosis?

A: That's correct.

Q: And, you would agree he has a risk of mesothelioma because of his asbestos exposure, wouldn't you?

A: Yes.

Q: Okay. Let's now talk about Mr. Ayers. Mr. Ayers satisfies, does he not, the requirement of the exposure and the latency?

A: Yes, sir.

Q: And, in your opinion, does he have any significant respiratory impairment from smoking, although he did smoke?

A: He has a bit of mild obstruction but it's not that significant. It's not causing him any real symptoms.

Q: You'd agree that to the extent he might complain of symptoms of shortness of breath, you wouldn't blame his cigarette smoking?

A: No, I'd blame the cumulative diseases [85] that he has.

Q: All right. Are you aware that one of his treating doctors has, in his records, has diagnosed asbestosis?

A: No, sir.

Q: Could I have Dr. Jana Peters records? This is a copy of Dr. Renn.

THE COURT: Okay, why don't you just use your exhibit. I mean, you've admitted those to evidence.

BY MR. RION:

Q: I anticipated that I might have trouble finding them. This is exhibit 7, in evidence. This is from Dr. Jana Peters in Princeton, West Virginia. Let me ask you if this appears to be some handwritten notes?

A: Yes.

Q: And that's a typical doctor scrolling that's kind of hard to read, at least for us—some of us lay people, although, his, actually, is not too bad, correct?

A: That's not too bad.

Q: And if we—if—the symbol DX normally stands for diagnosis, does it not?

A: Yes.

[86] Q: And under DX, or diagnosis, Dr. Peters has written, "Bronchitis," which would be due frequently to cigarette smoking, correct?

A: Well, no. Most acute bronchitis is caused by infectious agents.

Q: Okay.

A: Most viral, some bacterial.

Q: All right, and then Number 2's—is that sinusitis, Number 2?

A: Yes.

Q: And that's a problem with your sinuses?

A: Yes, sir.

Q: And Number 3, he's written in here, "Asbestosis," under diagnosis?

A: Yes.

Q: Now, when—can you go back to your report in this case?

A: (Witness complied.)

Q: You had, I believe, some medical records available to you when you did you report in this case, did you not?

A: Yes.

Q: And you listed them in your report?

A: Yes.

[87] Q: And was this—was this record one of the records you listed in your report?

A: It was not.

Q: Okay. Would you agree that because of his asbestos exposure, Mr. Ayers has a risk of mesothelioma?

A: Yes, I would, but I'd like to back up to start—

Q: Yes, sir.

A: —this diagnosis—

Q: Yes, sir.

A: —of asbestosis.

Q: Uh-huh.

A: This is the first—this is a first encounter with this person—

Q: Uh-huh.

A: —apparently, on 5-8-95, and it says under past significant medical history, gout, increased blood pressure, arthritis, asbestosis—

Q: Uh-huh.

A: —MI eight years ago. It's not—

Q: MI means?

A: My inquiry.

Q: I'm sorry, I didn't mean to interrupt [88] you, continue.

A: And, if it's a common practice of the doctor if the person has something in their past medical history that they are aware of, they might put it into their diagnosis, and then consider it later, and, with these records that you handed me is an x-ray report dated that same day, 5-8-95, and it's by Dr. Rombia, who I know is a B-reader, and he read the x-ray as, "Underlying COPD and changes of bronchiolitis with no pneumonia."

So, he didn't read anything about interstitial fibrosis or asbestosis or anything like that. So I don't know where Dr. Peters, who—I don't know Dr. Peters' qualifications, but I don't know if Dr. Peters is an x-ray doctor or just—or a family practitioner, or what. So I can't—I don't have any basis for that particular diagnosis.

Q: But you'd agree, he included asbestosis, not just in the history but under the category of diagnosis?

A: Yes, he did, but I don't know his basis for this.

Q: All right, let's back it up, I think I was on the subject of you'd agree that Mr. Ayers, [89] because of his asbestos exposure, has an increased risk of mesothelioma?

A: Yes, sir.

Q: Let's talk about Mr. Doyle Johnson. Let me know when you get organized with him.

A: I have his report, yes, sir.

Q: Yeah. Tell me what your report on Mr. Johnson says about his dust exposure.

A: Well, the report says from 1952 until 1957. However, that's a typographic error. I was—when I was looking through his record I went back to my original notes and it should read 1952 to 1987.

Q: Uh-huh.

A: And then he said that he worked as a track laborer until 1960 and then was a machine operator for N&W Railroad, and he believed that he'd been exposed to asbestos, and he said for a period of three weeks in 1984 he worked on a crane that had friction bands containing asbestos, and after three weeks the bands were replaced with another substance.

Q: And that's all you have. You didn't have in your history anything about exposure to coal?

A: No, sir.

Q: On the other hand, you felt like, as [90] far as asbestos was concerned, he had a history and an appropriate latency period?

A: Yes, I did.

Q: And, if we look at the test you did, his diffusing capacity was down, was it not?

A: Yes, it was.

Q: And this is—this is a finding indicating some laboratory detectable problem in gas exchange?

A: Well, not at that level. There are studies that are done on diffusing capacity, and if it is above, in fact, I believe in the AMA Guides, if it's above sixty percent of predictive, there's no hypoxemia.

Q: Yes, sir.

A: I believe, clinical hypoxemia, and then there are papers that state that it's even more than that, that it's above fifty percent of predictive.

Q: I used the wrong term. All I meant to say, and you're—I think you corrected me. I asked the wrong question, but his diffusing capacity finding was abnormal?

A: Yes.

Q: That's really what I meant, and an abnormal diffusing capacity finding is one of the things [91] the ATS paper says you should look for?

A: That's correct.

Q: Now, he had some degree of obstructive lung disease, or did he, I wrote in my notes he did?

A: Yes, he did.

Q: And you've agreed with me that coal dust exposure is something that can cause obstructive lung disease?

A: Yes, it can. However, if coal dust exposure causes obstructive lung disease it doesn't cause a bronchial reversible obstruction lung disease, and he had bronchial reversibility. He had significant bronchial reversibility by the American Thoracic Society criteria for that.

Q: Would you blame his cigarette smoking for any of that?

A: No, sir. I just believe that he has asthma, a mild asthma.

Q: So, as far as his cigarette smoking, do you believe Mr. Johnson has any significant respiratory impairment from cigarette smoking?

A: No.

Q: Okay, Mr.—let's just, briefly, again, on Mr. Doyle Johnson, you'd agree that because of [92] his asbestos exposure, he's at a risk of incurring mesothelioma?

A: That's true, but someone really needs to be looking more at Mr. Johnson's—the whole picture because of the possible pneumonia.

Q: He's testified that he's had that checked out and it has some indication that he has it, but it's controlled.

A: Okay.

Q: Yes, sir. All right. We're down to, I think I've got one more case to talk to you about and that is Mr. Spangler. If you could get your file on Mr. Spangler.

A: Yes, sir. I have it.

Q: All right. Now, Mr. Spangler had a fairly long history of asbestos exposure and he satisfied the latency requirement?

A: Yes, sir.

Q: And I think his diffusing capacity was also reduced?

A: Yes, sir.

Q: And it was abnormal?

A: Yes.

Q: And that, again, is one of the findings [93] that the American Thoracic Society says we look for in asbestosis?

A: Yes.

Q: Now, there—I want to go—again, you've indicated that asbestosis is an interstitial lung disease?

A: Yes.

Q: And it causes an increase in interstitial markings, primarily in the lower parts of the lung?

A: Yes.

Q: I want to go over with some x-ray reports, and I guess we'd start with 8-15-95. These, again, are all in evidence. Actually, I take that back, these are not in evidence, Mr. Spangler's x-ray reports, so I would just have this marked as Plaintiff's next—35.

(WHEREUPON, the document referred to was marked for identification as Plaintiff's Exhibit No. 35.)

MR. RION: Your Honor, I move the admission of Plaintiff's 35, Bluefield Regional Medical Center dated 8-15-95.

THE COURT: Questions.

[94] MR. RION: It's admitted, Your Honor?

THE COURT: Yeah.

(WHEREUPON, the document previously marked as Plaintiff's Exhibit No. 35, was admitted into evidence.)

BY MR. RION:

Q: Looking at this with me and you've got copies—or I never gave you a copy, I'm sorry. This is a portable chest x-ray, 8-15-95, and it does, does it not, say that there's in increase in interstitial markings?

A Well, it does say that but you have to take that into the context. This is a person that, apparently, is having pneumonia at this time, or resolving pneumonia, because it says, "Since a previous examination of 8-11-95, four days earlier, there has been a significant decrease in consolidation of the left upper lobe and left base with bronchograms noted, and I wouldn't—also this is a portable x-ray, taken ____ and you can't read a portable x-ray that finely, especially if you've got pneumonia.

Q: It does say here interstitial lung disease, does it not?

A: That's what it says.

[95] Q: And asbestosis is an interstitial lung disease?

A: Yes.

Q: And, Doctor—

A: So can pneumonia be an interstitial lung disease.

Q: But they were aware of the pneumonia and separately categorized it, did they not?

A: That's what he's—he says, "including left lung pneumonia interstitial lung disease."

Q: Yes, sir. Thank you. Could I also have 12-6-90? This is Bluefield Regional Medical Center, and I'd like to have this marked as Plaintiff's 36.

(WHEREUPON, the document referred to was marked for identification as Plaintiff's Exhibit No. 36.)

MR. RION: We move the admission of Plaintiff's 36, which is Bluefield Regional Medical Center 12-6-90 chest x-ray report.

THE COURT: I'm sorry.

(WHEREUPON, the document previously marked as Plaintiff's Exhibit No. 36, was admitted into evidence.)

[96] MR. RION: Can we place this on the screen also?

BY MR. RION:

Q: It says right here (indicating), that there is, looking at the top, increase in interstitial markings most evidence [sic] in the basis, and, again, I think you said that with asbestosis you get an increase incidence of interstitial markings and they tend to be most evident in the base of the lung, is that correct?

A: That's correct.

Q: And it—go ahead, I'm sorry.

A: The x-ray goes on about ____ and/or scarring in the left base, and as I remember Mr. Spangler's x-rays, he's the one that has the large Bullous emphysema, which is—which presses down upon the basis, and would compress the normal bronchial vascular markings in the basis.

Q: Yes, sir, but the impression was, "Interstitial and chronic obstructive pulmonary disease?"

A: Interstitial and obstructive pulmonary disease?

Q: Yes, sir.

A: Yes, sir.

[97] Q: Could I have x-ray report from Dr. George Couts? Could I have this marked as Plaintiff's Exhibit?

(WHEREUPON, the document referred to was marked for identification as Plaintiff's Exhibit No. 37.)

MR. RION: We move—

THE COURT: I got you.

THE WITNESS: Your Honor, I can't—

MR. RION: It's 1-12-81.

THE WITNESS: '81 or '90?

MR. RION: '81 or '90?

THE WITNESS: That's what I say, you don't know. I mean, I can't read it. I don't know what date it is. We need a better copy as to the date and so forth. I can't read it.

MR. RION: Well, we'll—Your Honor, I'd just like to show you a form—I think this is the best we have. It's from Dr. Lesnar's records, and this is—

THE COURT: You're question is what date this was done?

MR. RION: Yes, sir.

THE COURT: I'm not sure as to 1-12-81 or '91, but here's what I was—

[98] MR. RION: I don't know what the ____ necessarily.

THE COURT: Yeah. I—I'm not sure that it makes much difference whether it's '81 of '91.

MR. ADKINS: Well, Judge, I don't, you know, as long as there is no representation of what the date is. I don't know.

THE COURT: Well, I'll admit it with the understanding that the date is what it is?

MR. RION: Yes, sir.

BY MR. RION:

Q: This is another x-ray report, and could we put this one on the screen, and this is Dr. George King, and the impression here is pneumoconiosis, is that correct?

A: Yes.

Q: And pneumoconiosis is a dust disease of the lungs, correct?

A: That's correct.

Q: And going back to your report that you give to the lawyers in Mr. Spangler's case, did you have some medical records available then?

A: Yes.

Q: Did you have Dr. George King's record [99] here with the pneumoconiosis impression?

A: No.

Q: Did you have the 12-6-90 x-ray that noted increased in interstitial markings?

A: No.

Q: Did you have the 8-15-95 x-ray showing interstitial lung disease, or stating interstitial lung disease?

A: No.

Q: Could I have the 4-13-92 record on—This is a report of 4-13-92, which is in evidence.

THE ADKINS: What exhibit is it?

MR. RION: It's—that's what I'm looking for.

THE COURT: Exhibit 9, I think.

BY MR. RION:

Q: Exhibit 9, already in evidence, and ask, again, in the records that you have, or had available when you did your report, was this record in there?

A: No.

Q: And, if we look under here (indicating), the doctor's report, "Chest x-ray showed increase in interstitial markings in both lung basis. [100] The patient does have a history of emphysema. The patient has a history of asbestos exposure during his work experience."

Could we go to Page 2? Again, they noted increase in interstitial markings, do they not?

A: Yes.

Q: And it says under Number 2, "Chest x-ray is consistent with pulmonary fibrosis. I suspect the patient has asbestos exposure and may well suffer from asbestosis," and, again, this is a record that you, when you wrote your report to the lawyers you did not have?

A: That's correct.

Q: Dr. Renn, you'd agree that there—you have been involved in—there have been situations where you do these evaluations—where you do these evaluations at your office, and I think it used to be that you had a situation where the x-rays that you had made in your office had to be read by a hospital radiologist for insurance purposes, back when you first started doing this, do you recall that?

A: They had to be read because I was doing examinations at the hospital.

Q: Yes.

[101] A: The hospital has a contract with the radiologist to read all x-rays.

Q: Okay. Maybe I—it used to be that you did these evaluations at the hospital instead of at your own office, and because of that a hospital radiologist had to read the x-rays?

A: That's correct.

Q: And I think—can you—see if you can go backwards and remember that there have been situations back when you had to do that, where you would read the x-ray as normal and the hospital radiologist in Morgantown might read it as showing interstitial fibrosis during these exams, just generally, do you remember that as happened?

A: Well, that happened, but that happened because I went down and talked to the radiologist about reading the x-rays, and they had represented themselves to me as being qualified to read for pneumoconiosis, and it was later that I found out that they were not qualified to read for pneumoconiosis, that they were not B-readers, and had never even taken the examination or studied for the examination, and best—

Q: Yes, sir, but subject to that qualification I am right that back when the hospital [102] radiologist in Morgantown was reviewing all your records, there were situations where you would say the film's normal and a hospital radiologist would say it showed interstitial fibrosis?

A: Yes, and vice versa, and sometimes we agreed, also.

Q: Now, one—one last thing, on Mr. Spangler's x-ray there is a place on the B-reader form where it says, "Are there any pleural changes consistent with pneumoconiosis," correct?

A: Yes.

Q: And you did write yes on there?

A: Yes.

Q: So you'd agree that Mr. Spangler has a—some pleural abnormalities caused by asbestos exposure?

A: Yes.

Q: And that pathologically that represents an injury to his tissue—his lung tissue?

A: Yes.

Q: You—and there have been studies that authors have done where they've studied populations of people with pleural plaques to see if their lung function is any different than populations of people [103] without these pleural plaques?

A: Yes.

Q: And some of these studies have showed an increased incident of lung impairment in populations of people with pleural plaques compared to populations of people without pleural plaques?

A: They've shown a scientifically significant change, but not a clinically significant change.

Q: But they have—okay. They've shown a statistically different degree of lung function in the pleural plaques population compared to the nonpleural plaques population?

A: Yes, middle.

Q: But statistically significant?

A: Statistically significant.

Q: And significant by being lower in the plaques population?

A: Yes, but not to the point where it would cause symptoms, or respiratory symptoms.

Q: You, yourself, have had, in the past, used the term asbestos related pleural disease?

A: Yes.

Q: And you've even, in earlier days, [104] written reports to lawyers in these cases using the term asbestos related pleural disease?

A: Well, I think I still do. In fact, in Mr. Spangler, I say he has benign asbestos induced pleural plaques.

Q: And you don't have any problem calling that asbestos pleural disease?

A: No.

MR. RION: Okay. I believe I'm done. Judge, if you would allow me to consult with my colleagues to see if I forgot something.

THE COURT: Do you want to take a recess?

MR. RION: That would probably make sense.

THE COURT: We'll take a brief recess.

MR. RION: And I think I'm finished.

(WHEREUPON, a recess was taken, after which the following proceedings were had.)

(WHEREUPON, cross examination was concluded as the testimony continued.)

MR. ADKINS: I have, very briefly, a few questions for you.

MR. RION: Doesn't the lawyer who did the [105] direct do the redirect?

THE COURT: They should, but I'll permit it.

MR. ADKINS: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. ADKINS:

Q Just a couple of questions, Doctor. You indicated, I think, in the cross-examination, that you felt like Doctor Gaziano did not use the correct interpretation according to Crapo on the DLCO.

Would you explain what you meant by that?

A He uses the 1981 Crapo prediction equations which came out of the American Respiratory Disease, and Doctor Crapo, in that paper presented two tables; one with prediction equations for the single breath DLCO, which is on page 186 of that paper, and on page 187, the prediction equations for DL/VA.

Q Again, the DLC, the VA is the correction?

A For ____ volume, yes. And in that, there are—this is a column which is titled Value Subtracted From Predicted To Set Lower 95 Percent Confidence Levels, and so the real way to interpret the Crapo prediction equations, if you use them, is you don't do it by a percent of predicted the way it is with [106] others.

You have to deduct the 95 percent confidence interval from the predicted value and then see whether or not the diffusing capacity that you found by testing the person is either above or below that.

And that's not what Doctor Gaziano does on his reports. He has a percent of predicted.

I sat down with Doctor Gaziano's reports and took the Crapo predicteds that he has and did the subtraction the way it is in Crapo's paper, and if you do the subtraction the way it is in Crapo's paper, Mr. Spangler, Mr. Shirley, Mr. Johnson and Mr. Vance have a reduced diffusing capacity by the Crapo standards.

Mr. Butler and Mr. Ayers do not. I believe that Doctor Gaziano said that in one of them.

However, if you take the Crapo paper and do the subtraction for the DL/VA and then compare that with Doctor Gaziano's findings in each of these gentlemen, only one of them is abnormal by the DL/VA, and that's Mr. Johnson.

Q Do you have, based on the history and the medical records and so forth of Mr. Johnson; is there a basis for the reduction in the DLCO corrected?

A Yes, he's the person who had the [107] pulmonary emboli, who had the vascular _____ which no longer has blood flow to a certain area of the lung, but he still has the lung tissue that is there to participate in breathing.

Q So, as I understand it, if you take the Crapo—if you use the Crapo predicted, and you follow the procedure that he recommends in his paper, and he did that in this case, using what Doctor Gaziano's test results and applied that; that all of them came out normal even under Doctor Gaziano's testing, with the exception of Doyle Johnson, is that correct?

A Yes.

Q If a patient has asbestosis, will his DLCO correct to normal?

A Yes. That is a statement that is made—actually Doctor Crapo made the statement. It's been made numerous places, but the statement is made in a paper that's by Crapo and Forrester. It's entitled "Carbon Monoxide Diffusing Capacity," and it appeared in *Clinics in Chest Medicine*, Volume Ten in June of 1989.

The statement that is made is on page 194 under interstitial lung disease, and it says, "DLCO and DL/VA are commonly abnormal interstitial lung diseases."

So, this statement is by Crapo himself [108] that interstitial lung diseases cause abnormality in both, and then if you look at another paper that appeared in *Chest*, called, "Clinical

Significance of Pulmonary Function Tests," and it's subtitled, "Use and Interpretation Single Breath Diffusing Capacity," and this is by Weinberger, Johnson and Wiese, and it says, "Diffuse interstitial lung disease is another chronic category disorder with a low DLCO. Although part of the decrease in diffusion is due to associated low lung volumes, DLCO is generally decreased out of proportion to volume, thus the abnormality is apparent even when compared with the predicted value based on VA."

So that establishes that the DLCO corrective for alveolar volume will still be abnormal in interstitial lung diseases.

Q In these particular cases, or these particular plaintiffs, again, the only one where that happened was with Mr. Johnson?

A That's correct. And whether or not you should use the DL/VA in interpreting the diffusing capacity, there is an—right after the American Thoracic Society published their official statement on diffusing capacity back in the mid-1980's, Doctors Rosenburg and Beckley—Doctor [109] Beckley is very prominent in studying asbestos people; she has studied Quebec miners quite a bit. And they wrote in a letter to the editor, and it's entitled, "Single Breath Carbon Dioxide Diffusing Capacity," and it says, "Because of the greater discriminatory power of DL/VA, that the above studies have demonstrated, it is our hope that appropriate prediction equations will be developed for DL/VA, as well as for DL in the next few years."

Then Doctor Crapo was allowed to reply to the letter, and he replied to the letter, and he says—and this was because of all of the committee members that published this official statement.

He says, "Many, if not most of the committee members use DL/VA routinely in interpreting diffusing capacity, and I think all would appreciate more information on this ratio."

So, if you just use the diffusing capacity, you are missing the true assistance of this particular laboratory, the true value of this laboratory test to help you in determining whether or not they have a disease process that is interfering with diffusion versus one that is causing lung destruction.

Q Okay, Doctor, I want to just ask you a couple [110] of other questions here, and then I'll sit down.

I want to go back to the ATS recommendations here dealing with the diagnosis of asbestosis, and I don't want to go back over what we've talked about here, but you made a statement on Direct that you did not need every one of these things, but there's a confidence level in terms of findings of these particular things.

Would you explain to the jury what you meant by that when you said it was a confidence level?

A If you have only the first two, the reliable history of exposure and the appropriate _____ period, but you don't have anything else that the doctor can go on or that the doctor can rely upon, then you don't know that anything has actually happened.

Part of the—the scientific method or the scientific proof of something is that first you determine a hypothesis or you determine that it could be possible, and so what the first two tell you really is that there could be an asbestos-related disease, but they don't tell you if there actually is one.

The scientific method is to then set about proving that your hypothesis is correct or incorrect, one way or the other.

It will be similar to, we know that a person [111] is standing on the curb waiting to cross the street, and we know that there are cars whizzing up and down the street, and then we don't see that person on the other side of the street.

Is it reasonable to say that well, they were run down, smashed flat, disintegrated by a car, or is it reasonable to say,

well, they got tired of waiting because there were too many cars and they turned around and decided to go around the block and go back the other way.

So that's all the first two tell you. Any doctor that relies upon the first two and then says there is an asbestos-related disease really doesn't have any scientific proof or evidence to do that.

So the only thing that we have clinically are basically the other four that are related there that are listed there, that you've heard way too much about already, and those other four, you might say since there are four of them, that each one would increase your confidence by 25 percent, until you could get up to be 100 percent confident.

Now that's not exactly true, but just for a rough guide you could say that, well, they've got number one, and I'm 25 percent confident. If they've got [112] number two, I'm 50 percent confident and so forth.

But they are given different weights. So, 25 percent is not fair to say.

Q Which one is given the most weight, Doctor?

A The most weight is given to the chest X-ray.

Q Doctor, is there anything in the Cross-Examination of Mr. Rion that changed your opinion about any—that you have given in this case or in these cases of these plaintiffs?

A No.

Q So if I asked you all those questions again about whether any of these individuals have asbestosis, your answer would be the same?

A Yes.

Q And if I asked you if they have any reduced diffusion capacity related to their asbestosis exposure, your answer would be the same that they do not?

A Yes.

Q Okay.

A Well, it was as it was. Some of them have reduced diffusion capacity, but—

[113] Q Related to asbestos or a diagnosis of asbestosis?

A No, not related to asbestosis.

MR. ADKINS: That's all I have, Doctor. Thank you very much.

RECROSS-EXAMINATION

BY MR. RION:

Q Just a few minutes, Doctor. Let's talk about this DLCO again. Now, if I understand, I want to get our terminology straight, and then we are going to go look at some recommendations.

As I understand, you have two scores here. One is going to be the DLCO, SB, and SB stands for single breath?

A Yes.

Q And that's the uncorrected. You can take that, and then you've got DLCO/AV, correct?

A VA.

Q And that means corrected for alveolar volume?

A Yes.

Q The single breath is uncorrected and VA is corrected alveolar volume?

A Yes.

[114] Q Now, if we go to the AMA—excuse me, the American Thoracic Society evaluation of impairment secondary to respiratory disorders, they say the test for single breath diffusing capacity should be performed by a method of Ogleby and coworkers or by a comparable method, do they not?

A Yes.

Q So they do recommend the single breath diffusing capacity, and they say the regression equations of Crapo and Morris are recommended?

A Yes.

Q If you go to the AMA guidelines for permanent impairment, they say—

A Before you get to the AMA guidelines—

Q Yes.

A —the evaluation impairment disability was written in 1986.

Q Yes, sir.

A If you remember, that was written before the comments by Rosenberg, Beckley and Crapo, where Crapo says, "Many, if not most of the committee members use DL/VA routinely in interpreting diffusion capacity."

Q Use both.

A Well, it's DL/VA. You are not talking [115] about that. He says in interpreting the diffusion capacity, but you do use both because they both have important clinical information.

Q They are both important?

A Yes.

Q If you go to the AMA guidelines for permanent impairment from 198—I believe this last edition, the Fourth Edition, is what 1995 or thereabouts?

A Somewhere in there.

Q They say here, "The single breath DLCO should be used for evaluation of all levels of impairment.

A That's correct, they do.

Q If we go to the work of the West Virginia Comp Board on occupational pneumoconiosis, they use the DLCO single breath for setting their impairments, do they not?

A That again is correct.

Q Now, I'm almost through. On this business about these findings—I think you and I agreed on this, and I don't think that you said anything different than what I'm about to suggest. You are not trying to say one finding is 25 percent sure; two [116] findings 50 percent; three is 75 and four is 100?

A No. That's just an example of level of confidence. That's all.

Q And it depends on—it's very much a matter of clinical judgment, and you said in some cases one of those clinical findings may be enough?

A Yes.

Q And sometimes, one may not be enough?

A That's correct.

MR. RION: Okay. That's it. Thank you.

MR. ADKINS: Judge, I believe I'd better not ask any more questions.

THE COURT: Thank you, Doctor. Let me have counsel up here for a second. You may step down.

THE WITNESS: Thank you, sir.

(WHEREUPON, the witness was excused.)

(WHEREUPON, the following proceedings were had at the Bench, in the presence, but out of the hearing of the jury, to-wit:)

THE COURT: Do you want to take a lunch

* * * *

No. 01-963

Supreme Court, U.S
FILED
JUN 17 2002
CLERK

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

JOINT APPENDIX
Volume Two

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June 17, 2002

PETITION FOR CERTIORARI FILED JANUARY 2, 2002
CERTIORARI GRANTED APRIL 1, 2002

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix of the 01-963 Petition for a Writ of Certiorari at the following pages:

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DEFENDANT'S EXHIBIT 1

---

1. A reliable history of exposure.

2. An appropriate time interval between exposure and detection (see pages 9-10).

Furthermore, we regard the following clinical criteria to be of recognized value:

1. Chest roentgenographic evidence of type "s," "t," "u," small irregular opacifications of a profusion of 1/1 or greater.

2. A restrictive pattern of lung impairment with a forced vital capactiy below the lower limit of normal.

3. A diffusing capacity below the lower limit of normal.

4. Bilateral late or pan inspiratory crackles at the posterior lung bases not cleared by cough.

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Apr 23 1998]

Clifford Arthur Vance	Civil Action No. 92-C-5829
Freeman Ray Ayers	Civil Action No. 93-C-6857
Carl Richard Butler	Civil Action No. 93-C-6876
James McCoy Spangler	Civil Action No. 93-C-7004
Doyle Johnson	Civil Action No. 92-C-8888
John T. Shirley, *et ux.*,	Civil Action No. 92-C-8970
Plaintiffs,	

v.

Norfolk And Western Railway Co.,
Individually and as successor to
the Norfolk Southern Railway Company,
a Virginia Corporation, et al.,

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S MEMORANDUM REGARDING CAUSATION AND APPORTIONMENT

Defendant Norfolk and Western Railway Company (hereinafter "N&W" or "defendant), by counsel, hereby sets forth its Memorandum regarding Causation and Apportionment.

A. Rogers v. Missouri Pacific Railroad Co Established Only "The Test Of A Jury Case"

Section 51 of the Federal Employers' Liability Act (FELA) provides, in pertinent part, that common carriers by railroad shall be liable in damages for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ." 45 U.S.C. § 51. Although this statute provides the general (and unremarkable) rule that a railroad may be liable for an injury to an employee

caused by a railroad's negligence, the statute does not explicitly address the issue of whether a railroad is liable for *all* damages associated with a particular claimed injury or health condition regardless of its cause or instead is liable only for the injuries or damages it caused.

The United States Supreme Court has answered the question of the extent of damages owed by a negligent railroad employer when it has caused only a fraction of a plaintiff's claimed injuries. It answered the question in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed. 493 (1957). In *Rogers*, the plaintiff's primary duty was to ensure that fires used to control weed growth did not burn out of control. The jury returned a verdict for the plaintiff who was injured when he fell into a culvert after he was overtaken by flames and smoke from the weed control fires while watching for "hot boxes" on passing trains. The Supreme Court of Missouri had reversed the verdict for plaintiff on the grounds that plaintiff's evidence did not support the jury's finding of defendant's liability.

The United States Supreme Court reversed the ruling of the Supreme Court of Missouri because . . .

> . . . [u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, *if that test is met, are bound to*

> *find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. . . .*

Rogers, 352 U.S. 500, 506-507 (1957) (footnotes omitted) (emphasis added).

Some courts at the urging of plaintiffs' counsel have distorted the text of the FELA and the holding in *Rogers* to argue that it sets the "the test of liability of the railroad carrier" and that a railroad defendant is solely liable for *all* damages attributable to an injury if the railroad's negligence played any part, no matter how small, in bringing about the injury. *Rogers* does not concern the standard to be followed by a jury in a FELA case when assessing negligence, but rather concerns whether evidence is sufficient *to submit the case to the jury*. "The court in that case (*Rogers*), however, was not speaking of 'the test of liability of the railroad carrier'. . . but 'the test of a jury case.'" *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 573 (9th Cir. 1960).

Recently, the Fifth Circuit explained yet again the meaning of the *Rogers* opinion. In *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) the court said:

> Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. §167; 688. Section 51 of the FELA provides, in pertinent part, that "*every common carrier by railroad . . . shall be liable in damages . . . for such injury or death* resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. §167; 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. In their earlier articulations of §167; 51 liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest. " In *Rogers, v.*

Missouri Pacific R. Co., 352 U.S. 500, 506 (1957), the Supreme Court used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA §167; 51 cases. In *Ferguson v. Moore-McCormack Lines., Inc.*, 352 U.S. 521, 523 (1957), the Court applied the same standard to a Jones Act case, writing, "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" (quoting *Rogers*, 352 U.S. at 506).

> *Nothing in these cases, then, supports the proposition that the duty of care owed is slight. Rather, the phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest," modifies only the causation prong of the inquiry. The phrase does not also modify the word "negligence." The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence. See Texas Food Indus. Assoc. v. United States Dept. of Agriculture*, 81 F.3d 578, 582 (5th Cir. 1996) (stating it is a "cardinal canon of statutory construction . . . that [in interpreting a statute,] the words of a statute will be given their plain meaning").

Despite the clarity of the Supreme Court's decisions, the word "slightest," used initially to refer to the quantum of evidence of an employer's breach of duty necessary to sustain a jury verdict, soon took on a different referent. Once the Supreme Court had reduced the statutory language "in whole or in part" to "any part, even the slightest," it was not long before our court further reduced the phrase "any part, even the slightest" to a shorthand expression of "slight negligence" or "slight evidence of negligence." Thereafter we used the

> phrase "slight negligence" uncritically. Justice Frankfurter's comment on the (mis)use of the phrase "assumption of the risk" in FELA actions aptly applies to our discussion today; "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring). The same holds true of our use of the phrase "slight negligence" or "slight care" in Jones Act negligence cases.

Gautreaux, 107 F.3d at 335 (emphasis added).

Rogers clearly concerns *only* the "test of a jury case" and does not set a negligence standard. Neither does it establish the principle that a railroad is liable for all damages arising out of an injury or medical condition.

While some courts have misconstrued the holding in *Rogers*, *Rogers* clearly did not set forth the proposition that slight causation on the part of a railroad rendered moot other causes of plaintiff's injuries. *Rogers* merely held that a jury verdict should not be overturned if "the proofs justify with reason the conclusion that employer negligence played any part" in causing the injury or death. *Rogers*, 352 U.S. at 506. As courts have correctly noted, the language from *Rogers* established the test of a jury case under the FELA but does not establish a test for liability under the FELA. *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993). Based on this recognition, courts have reversed verdicts in cases in which the "even the slightest" language has been included in the jury instructions. *See, e.g. Bertrand v. Southern Pac. Co.*, 282 F.2d 569 (9th Cir. 1960), *cert. denied* 365 U.S. 816 (1961).

The Supreme Court did not hold in *Rogers* that a railroad is liable for 100 % of the damages attributable to an injury if the injury was caused in whole or in part by factors unrelated to

the railroad's negligence. A plaintiff suing under the FELA must prove that his injury was caused by the railroad's negligence. If a plaintiff proves that his injury was caused, in whole or in part, by the defendant railroad's negligence, then he is entitled to collect only the damages that are attributable to the portion of the injury caused by the railroad's negligence. *See Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989); *See also, Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (plaintiff cannot recover damages which are not proximately caused by defendant's alleged negligence).

West Virginia judges in FELA trials routinely give clear instructions to juries that a railroad defendant is liable *only* for the damages it has caused, and *is not* liable in damages for other health problems or for the proportion of a plaintiff's injury not caused by the railroad's negligence.

For example, Judge Charles Haden II in *Gradis Boyd, et al. v. CSX Transportation*, U.S.D.C., S.D. of W.Va., Docket No. 3:87-0973 instructed the jury:

> The defendant is not to be held responsible for any hearing loss or tinnitus or both which the plaintiff may have suffered which resulted from any cause other than the negligence proven by the evidence. Any hearing loss or tinnitus which you find to be attributable to any other cause and which was not the direct result of negligence of the defendant, as proven by the evidence, would not be a part of this action and that should not be considered by you.

See Page 522, *Boyd Trial Transcript*, attached hereto as *Exhibit A*.

Judge Kendrick King in *James E Perry v. N&W*, Civil Action No. 93-C-762, Circuit Court of McDowell County, West Virginia, instructed the jury:

> If you find that any of the plaintiff s claimed damages are due in part, no matter how large or small, to any cause other than the defendant's negligence, the defendant is not financially responsible for that other part.

See Page 712, *Perry Trial Transcript*, attached hereto as *Exhibit B*.

In *Keith Peyton v. CSXT*, Civil Action No. 91-C-101, Circuit Court of Boone County, West Virginia, Judge E. Lee Schlaegel, Jr. instructed the jury:

> In this matter the defendant is only responsible to pay damages to the plaintiff for that portion of his injury, if any, that were caused by its negligence. Therefore if you find that the plaintiff's condition was caused by factors other than the acts or failures to act by the defendant, if any, whether the other cause to be as a result of the plaintiff's own conduct or some other factor the defendant cannot be held responsible for that percentage of plaintiff's condition.

See Page 1182, *Peyton Trial Transcript*, attached hereto as *Exhibit C*.

Clearly, West Virginia trial court judges have routinely instructed juries that railroad employers are liable *only* for what they cause.

In *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396 (1994), the United States Supreme Court exhaustively examined the statutory framework of the FELA to determine whether a negligent infliction of emotional distress claim was cognizable under its provisions. Because the FELA is silent as to such a claim, the United States Supreme Court reasoned that courts should look to common-law principles in

interpreting the FELA if such principles are not expressly rejected by the FELA:

> [A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Because the FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

Gottshall, 114 S.Ct. at 2404.

After comprehensively reviewing the common-law principles, the Court concluded that because negligent infliction of emotional distress was a tort recognized in certain forms by the common-law, such a claim was therefore cognizable under the FELA. *Gottshall*, 114 S.Ct. at 2407-2408.

In the present case, because the FELA is silent as to whether a railroad is liable only for the injuries it caused or for all injuries suffered by the plaintiff (including injuries sustained as the result of the plaintiff's conduct) if it caused any injury to the plaintiff, common-law principles must be examined to determine the appropriate causation standard to be employed in an FELA case and particularly an FELA occupational disease case such as the present case where the alleged injury (breathing problems) can result from both occupational and non-occupational causes. Under the common-law, it is axiomatic that a person who negligently causes harm to another is liable only for that portion of the harm that results from the actor's negligence. As the RESTATEMENT (SECOND) OF TORTS § 430 makes clear:

> § 430 Necessity of Adequate Causal Relation
>
> In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the

negligence of the actor be a legal cause of the other's harm.

Significantly, the Restatement further mandates that harm attributable to various causes be apportioned between or among those causes in determining the liability of a negligent actor:

> § 433A Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

RESTATEMENT (SECOND) OF TORTS § 433A.

As these principles make clear, a railroad is only liable for those injuries caused by its negligence under the FELA and is not liable for injuries that result from other causes.

Consistent with this rule, the Supreme Court of Pennsylvania in *Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037 (Pa. 1989), held that a railroad is liable only for those injuries caused by its negligence, not for conditions or injuries suffered by the plaintiff that may have resulted from other causes. In *Dale*, as in the present case, Dale alleged that he suffered from a lung impairment due to asbestos-related disease as the result of his exposure to asbestos while employed by the B&O. In response to the medical testimony offered by Dale that his lung condition was caused by asbestos exposure, the B&O offered evidence that Dale suffered from a lung disease that he had contracted prior to his work for the B&O.

The Supreme Court of Pennsylvania recognized that 45 U.S.C. § 51, in isolation, did not explicitly answer the question of whether a railroad is liable for all damages attributable to an injury where the railroad caused only a part of the

injury. The Court rationalized that because 45 U.S.C. § 53 provides that an employee's contributory negligence shall diminish his recovery in proportion to the amount of negligence attributable to such employee . . .

> . . . it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused.

Dale at 1041.

The Supreme Court of Pennsylvania went on to hold:

> (A)n employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id. at 1041.

Applying the reasoning of the Pennsylvania Supreme Court, N&W is liable only for those injuries attributable to its alleged negligence. If plaintiffs' alleged injuries were caused in whole or part by other persons or entities, the defendant must be allowed to put on evidence of the alternative causes of plaintiffs' injuries and the jury must be instructed to consider the evidence in its deliberations.

B. Courts Routinely Receive Apportionment Evidence And Give Apportionment Instructions

Courts handling Federal Employers' Liability Act cases routinely admit evidence and give instructions concerning apportionment of damages. This shows that the principle of apportionment in FELA cases is so well-accepted as to be axiomatic.

In *Sauer v. Burlington Northern*, 106 F.3d 1490 (Tenth Cir. 1996), the plaintiff was a railroad conductor who had suffered two workplace accidents and hurt his back in each accident. The jury found the Burlington Northern negligent with regard to the second accident only. On appeal, the plaintiff complained there was insufficient evidence from which the jury could apportion his injuries between his pre-existing back condition and the two workplace accidents.

The Tenth Circuit held there was enough evidence to permit the jury to apportion damages, and went on to say: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment." *Sauer*, 106 F. 3d at 1494 (citations omitted). In addition, the *Sauer* court also noted that apportionment can be proved *without expert testimony* stating the percentage of injury attributable to the different causes. *Sauer*, 106 F.3d at 1494.

In *Stevens v. Bangor And Aroostook Railroad Company*, 97 F.3d 594 (1st Cir. 1996) the plaintiff injured his back at work. Two weeks before trial began he suffered a "cardiac event" about which defendant wished to question plaintiff to show his future life span was limited. While the defendant was prohibited from questioning plaintiff on this issue because it did not timely disclose an intention to do so before trial, the appellate court recognized that the defendant railroad could have asked these questions had it only notified plaintiff it was going to do so:

> If post-accident health problems have an impact on a plaintiffs ability to work or on his life expectancy and arise independently of the accident, defendant is entitled to adduce evidence of such problems in an effort to reduce a potential damages award.

Stevens, 97 F.3d at 599.

The *Stevens* court went on to observe that as a general rule when a defendant's negligence aggravates a plaintiff's pre-existing health condition, the defendant is liable only for the additional increment caused by defendant's negligence and not for the pain and impairment plaintiff would have suffered had the accident never occurred. *Stevens*, 97 F.3d at 601.

In *Varhol v. National Railroad Passenger Corporation*, 909 F.2d 1557 (7th Cir. 1990) (*en banc*), the court upheld the use of interrogatories asking the jury "to determine what portion of [plaintiff's] condition . . . resulted from the [accident], and, if it could determine that portion, to take it into account in determining damages." *Varhol*, 909 F.2d at 1564. Plaintiff had Multiple Sclerosis, and the court permitted evidence and instructions about apportioning plaintiff damages between plaintiff's MS and his workplace injuries, including any aggravation of the symptoms of the MS which the workplace injuries caused.

In *Gallimore v. Missouri Pacific Railroad Company*, 635 F.2d 1165 (Fifth Cir. 1981) the plaintiff, a railroad brakeman, was injured in a train coupling accident. In the first of two trials, the jury found defendant was not negligent, but found plaintiff was responsible for only 80% of his "injuries." *Gallimore*, 635 F.2d at 1166. The district court thought the verdict was inconsistent since defendant was not found to be 20% at fault, and granted a new trial. Immediately before the second trial, the case was transferred to another judge. *Gallimore*, 635 F.2d at 1169. At the conclusion of the second trial, the jury found defendant negligent and plaintiff contributorily negligent, and awarded $390,000 in damages. The district court then granted the railroad's post-trial motion and entered judgment on the *first* jury's verdict.

On appeal, the Fifth Circuit said that the first jury's verdict finding Gallimore 80% negligent and the Missouri Pacific not at all negligent *was not inconsistent* because there was . . .

> . . . ample testimony in the record to indicate that there were other contributing causes to Gallimore's injuries besides any negligence that was involved in the train accident. Specifically, there was evidence that Gallimore suffered from a congenital back problem that could perhaps have been aggravated by the accident; given this testimony, it is not improbable that the jury believed that this preexisting condition was responsible for 20% of Gallimore's injuries.

Gallimore, 635 F.2d at 1173-4.

Clearly, the various courts whose opinions are discussed *above* could merely have said "if a FELA defendant's negligence caused any part of the plaintiffs injuries it must pay damages for all of them" had this been the law. But this is not the law. Apportionment of damages among causes is required under the Federal Employers' Liability Act and must be permitted by this court.

NORFOLK AND WESTERN RAILWAY COMPANY,

By /s/ Rodney L. Baker II
Of Counsel

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West Virginia Bar No.: 0076
Rodney L. Baker II, Esq.
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NORFOLK AND WESTERN RAILWAY COMPANY

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 10.

CAUSATION BY ONE OTHER THAN RAILROAD

If you find that the plaintiff in this case has a condition or disease which was caused by his employment with employers other than the railroad, plaintiff's recovery must be limited to only such damages as result from his railroad employment and he cannot recover damages which have been or will be caused by his non-railroad employment. This is so because the railroad can be held responsible only for such of a plaintiff's damages as result from its alleged negligence while the plaintiff was employed at the railroad.

Matthews v. Atchison, T. & S. F. Railway Co., 129 P. 2d 435 (Cal. App. 1942)

Holladay v. Chicago, Burlington & Quincy Railroad Co., 255 F. Supp. 879 (S. D. Iowa 1966)

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

_____

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 11.

CONTRIBUTORY NEGLIGENCE—
CIGARETTE SMOKING

The Court instructs the Jury that if you find that a Plaintiff have sustained an asbestos-related injury disease, and if you find that the Defendant, Norfolk and Western Railway Company, was negligent and that such negligence contributed in whole or in part, even in the slightest, to cause the Plaintiff's injury or disease, then the Plaintiff can recover only for such injury or disease that you find to have been caused by asbestos. He cannot recover for any aggravation of an asbestos-related injury or disease which you find to have been caused by smoking.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 13.

AGGRAVATION/SMOKING

The Court instructs the Jury that if you find that the Plaintiff has sustained an asbestos-related injury/disease, and if you find that the Defendant, Norfolk and Western Railway Company, was negligent and that such negligence contributed in whole or in part, even in the slightest, to cause the Plaintiff's injury or disease, then the Plaintiff can recover only for such injury or disease that you find to have been caused by asbestos. He cannot recover for any injury or disease caused by smoking. Nor can he recover for any aggravation of an asbestos-related injury or disease which you find to have been caused by smoking.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 14.

PREVIOUS CONDITION; AGGRAVATION

The Court instructs the Jury that if you find that the defendant, Norfolk and Western Railway Company was negligent in exposing the Plaintiff to asbestos, and if you find that the Plaintiff was negligent in smoking cigarettes, and that the negligence of each combined to cause pulmonary injury to the Plaintiff, the Plaintiff is entitled to recover, but you are required to diminish his damages in proportion to the amount of negligence attributable to him.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 20.

CONTRIBUTORY NEGLIGENCE—
CIGARETTE SMOKING

If you find from a preponderance of the evidence that plaintiff smoked cigarettes and that plaintiff's cigarette smoking caused in whole or in part the injuries of which plaintiff complains, then you may find that the plaintiff was contributorily negligent. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

Dale v. Baltimore & Ohio R.R. Co., 552 F.2d 1037 (PA 1989).

Zarow-Smith v. New Jersey Transit Rail Operation, Inc., 953 F. Supp. 581, 587-589 (D.N.J. 1997).

GIVEN _____
REFUSED _____
WITHDRAWN _____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876
	Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,
Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 21.

NEGLIGENCE

The Court instructs the Jury that if you find that the defendant, Norfolk and Western Railway Company was negligent in exposing the Plaintiff to asbestos, and if you find that the Plaintiff was negligent in smoking cigarettes, and that the negligence of each combined to cause pulmonary injury to the Plaintiff, then the Plaintiff is entitled to recover, but you are required to diminish his damages in proportion to the amount of negligence attributable to him.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876
	Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,
Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 30.

FEAR OF CANCER

You are instructed that plaintiffs are not entitled to recover damages for any condition unless plaintiffs have proven by a preponderance of the evidence that it is more likely than not that they have or will develop such condition. Therefore, the court instructs you that you cannot award damages to plaintiffs for cancer or for any increased risk of cancer. Damages for cancer or an increased risk of cancer are not permitted because plaintiffs have not, as a matter of law, proven that they are entitled to such damages.

You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. You are not to consider evidence regarding cancer or increased risk of cancer for any other purpose.

Under the Federal Employees Liability Act (F.E.L.A.), plaintiffs are not entitled to recover damages for fear of developing a disease unless you find that plaintiffs have proven by a preponderance of the evidence that each plaintiff has an actual likelihood of developing cancer and that each plaintiff has exhibited physical manifestations caused by the alieged fear of cancer. Under the F.E.L.A., physical manifestations which are sufficient to support a claim for emotional distress in connection with a fear of developing cancer include post traumatic stress disorder, accompanied by sleeplessness, weight loss, and vomiting. You cannot award damages to a plaintiff for fear of cancer unless you find that he has proven by a preponderance of the evidence that he has an actual likelihood of developing cancer and that he has experienced physical manifestations caused by fear of developing cancer.

Marchica v. Long Island Railroad Co., 31 F.3d 1197, 1202 (2nd Cir. 1994)

Consolidated Rail Corp. v. Gottshall, __ U.S. __, 114 S.Ct. 2396 (1994).

Metro-North Commuter R.R. Co. v. Buckley, 117 S.Ct. 2113, 2118 (1997).

Doner v. Adams Contracting Inc., 617 N.Y.S. 2d 565, 566 (A.D. 3 Dep't 1994).

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL ACTION NO. 93-C-6857

FREEMAN AYERS,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,

Defendants.

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

Express your determination in percentages.

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 93-C-6876

_____

CARL RICHARD BUTLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-8888

_____

DOYLE JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-8970

_____

JOHN T. SHIRLEY,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 93-C-7004

_____

JAMES MCCOY SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-5829

_____

CLIFFORD VANCE,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY a corporation, *et al.*,

Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

Express your determination in percentages.

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April__,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

FREEMAN AYERS,
DOYLE JOHNSON,
JAMES SPANGLER,
CLIFFORD VANCE,
JOHN SHIRLEY,
CARL BUTLER,

Plaintiffs,

vs. Civil Action No. 93-C-6857
92-C-8979
93-C-6876
92-C-8970
93-C-7004
92-C-5829

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation,

Defendant.

_____

TRIAL TRANSCRIPT
April 27, 1998

* * * *

JURY INSTRUCTIONS

[15] First, counsel, the parties and I want to thank you for your patience and attention throughout this case, your care in the consideration of the evidence and patience during recesses and delays.

These instructions are given to you to explain the law as it relates to: (1) the rules which you must follow in your deliberations and in weighing and considering the evidence,

and (2) the law governing the claims of the plaintiffs and the defense of the defendant.

As you may know, my role and yours are quite different. It is my duty as a Judge essentially to act as a referee during the trial and to instruct you about the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply the rules of law as I state them to you. If you disagree with the law that I explain to you, you must nevertheless apply that law because you have taken an oath to respect the law.

[4] [sic] In your review of the evidence and in reaching a decision, you should not be influenced by sympathy, prejudice or public sentiment.

As you consider these instructions, you should not single out one instruction or a part of an instruction and ignore the remainder. Instead, you must consider all of these instructions as a whole and view each instruction in light of all of the others. Also, don't be influenced by the order in which the instructions are presented or by the manner in which I read them to you.

THE JURY'S DUTY

You are the only judges of the facts in this case. In other words, it is your responsibility to decide what the true facts are from all of the evidence which you have seen and heard.

Nothing which I may have said or done during this trial should be considered by you as an indication that I believe or disbelieve certain facts or witnesses. You should disregard any expression or action by me which would seem to indicate any opinion that I have on the facts.

The only evidence that you may consider are [5] the sworn statements of the witnesses, the exhibits that have been received in evidence and any facts stipulated by counsel.

You should consider all of the evidence whether it has been referred to by me or by the lawyers. As I have told you, the statements of counsel are not evidence unless all of the lawyers stipulate or agree that a fact is true. When the lawyers stipulate a fact, you may accept that fact as true without the testimony of a witness or any exhibits.

In determining whether any fact has been proved in this case you may, unless I tell you otherwise, consider the testimony of all witnesses, no matter who called them and all exhibits received in evidence, regardless of who may have produced them.

Generally, there are two types of evidence from which you may properly find the truth in a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you [6] find the facts in accordance with all of the evidence in this case, both direct and circumstantial.

You are to consider only the evidence presented and you may not guess or speculate as to the existence of any facts in this case. But, you may draw from the facts which you find have been proved, such reasonable inferences as seem justified in light of your own experience.

At times though out the trial, I have been called upon to pass on the admissibility of certain evidence which was offered. Don't be concerned with my rulings or the reasons for them because, whether evidence is admissible or not is a legal question. If I admit evidence to which an objection has been made, I do not determine what weight should be given to such evidence because that is your responsibility. If an objection was sustained, don't guess what the answer might have been or why the question was asked.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, the "credibility" of a witness means the truthfulness or [7] believability of a witness. The "weight of the evidence" means the extent to which you are or are not convinced by the evidence. The number of witnesses testifying on one side or the other of an issue is not alone the test of the credibility of a witness or the weight of the evidence. If warranted, you may believe a single witness as against a number of witnesses who testify differently. The proper tests are how truthful was the witness and how convincing was his or her testimony in light of all of the evidence and circumstances shown.

In deciding whether the statements of a witness are truthful and convincing or not, you should carefully examine the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and his or her behavior and appearance while on the witness stand. You should also consider any relation each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which each witness is either supported or [8] contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to disbelieve such testimony. Two or more persons who witness an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not uncommon. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses should be considered by you, but, in weighting their effect, you should consider whether they

pertain to a matter of importance or to an unimportant detail, and whether they result from an innocent error or a willful falsehood.

A witness may be discredited or impeached, not only by contradictory evidence, but also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of the witness. If you believe that any witness has made statements at other times which are inconsistent with the testimony given in this trial, then you should also consider whether the inconsistency results from an innocent error or from a willful falsehood and whether [9] it pertains to a matter of importance or an unimportant detail.

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned, you may decide to believe all of the testimony of a particular witness, or you may accept or disregard any part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, as you may think it deserves.

In considering a verdict you should take into consideration the fact that not all persons live to the age of expectancy for reasons unrelated to the injuries alleged in this case and other persons live beyond their normal life expectancy. The life expectancy tables that have been admitted in evidence are based on averages and are only an aid for you in your deliberations together with all of the other evidence in the case.

EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to testify opinions or conclusions. An exception to this rule exists as to persons referred to as "expert witnesses". These are witnesses who, by virtue [10] of education or experience, have become more knowledgeable on a certain subject than the average person.

Witnesses who are recognized as experts may state their opinions about relevant matters and may give their reasons for the opinions. You should consider any expert opinions given in this case and give to such opinions such weight as you believe they deserve. In determining the weight to be given to the opinion of an expert you should consider the education, training and experience of the expert, the basis for the opinion, the reasons given by the witness and the opinions of other similar witnesses on the same matters as well as the rules generally applicable to all witnesses in this case.

BURDEN OF PROOF

In order to recover damages, the plaintiff(s) must prove every element of their individual claims by a preponderance of the evidence. By a preponderance of the evidence means by the greater weight of the evidence. A fact is proved by a preponderance (or by the greater weight of the evidence) if you, the jurors, believe that it is more likely true than not true. The [11] burden is also upon the defendant to prove by a preponderance of the evidence that the plaintiffs or any of them were negligent and that their negligence proximately contributed to their injuries.

CLAIMS AND DEFENSES

Although in this trial you have heard evidence concerning the claims of several plaintiffs, you must weigh the evidence you have heard concerning each plaintiff's claim individually. Therefore, you must listen to and apply each of the following instructions of law to each plaintiff's case individually. As you listen to these instructions, bear in mind that each instruction relates to each plaintiff's claim individually, and were therefore written to apply to each plaintiff individually.

The mere fact that a plaintiff brings a suit for damages in this Court in and of itself does not in any degree establish a right to such damages. The mere fact of initiating a suit at law

is not to be considered by you as establishing the right of a plaintiff to recover.

The mere fact that the plaintiff may have been exposed to some substance at work and that he may have contracted a condition or disease that results from such [12] exposure does not in and of itself and, without more, make the railroad liable to the plaintiff or raise any presumption of negligence on the part of the defendant railroad.

Claims for job related injuries made by employees of railroad companies which are engaged in interstate commerce are governed by Federal law, specifically the Federal Employers' Liability Act. This law is commonly referred to as "[FELA]" and this shorthand reference will be used for convenience in these instructions.

The defendant, Norfolk and Western Railway Company, is the successor-in-interest and is responsible for the acts and omissions, if any, of the Virginian Railroad. Any reference in these instructions to Norfolk and Western, N&W or the railroad should be understood to include the Virginian Railroad.

The defendant in this case, Norfolk and Western Railway Company, is a corporation and can act only by its agents or servants. Therefore whenever mention is made of defendant doing or not doing something, it means that the defendant was acting through its agents or servants within the scope of their [13] employment.

Section 51 of the Federal Employers' Liability Act (45 U.S.C. § [51]), the law under which the plaintiff has brought this lawsuit, provides in part that:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for

injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is agreed that, at the times and places alleged in the complaint, defendant N&W was a common carrier by railroad, engaged in interstate commerce; that each plaintiff was then an employee of defendant N&W, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

Therefore, in order to recover damages under the [FELA], the plaintiffs must prove by a [14] preponderance of the evidence that the N&W was negligent and that the negligence proximately caused injuries to them. Under the terms of the Federal Employers' Liability Act, if you find by a preponderance of the evidence that the railroad company was guilty of any negligence whatsoever, and you further find from a preponderance of the evidence that such negligence contributed, however slightly, to the injury of the plaintiff, then your verdict must be in favor of the plaintiff and against the defendant railroad. There may be more than one cause to any injury. However, a plaintiff may recover from the defendant if it is established that negligence on the part of the defendant was a cause of the injury. For the purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part in bringing about or actually causing the injury or damage.

Under [FELA], the employer is not held to an absolute responsibility for the safe condition of the workplace, but only to the duty of exercising reasonable care to that end, the

degree of care being [15] commensurate with the danger reasonably to be anticipated.

Negligence is defined as the failure to do what a reasonably careful person would have done under the same or like circumstances, or the doing of something which a reasonably careful person would not have done under the same or like circumstances. In other words, negligence is the failure to exercise reasonable and ordinary care. Specifically, it was the duty of N&W to protect its employees from those hazards at the workplace that it knew or had reason to know of. This duty included the obligation to warn the employees, to provide protective devices and to take other reasonable steps to eliminate the possibility that its employees would be injured by the hazards that it knew or had reason to know of.

In determining whether the defendant railroad knew or should have known that exposure to some substance would result in injury to the plaintiff, you may look to the evidence in this case bearing upon what has been referred to as the state of the art. The term "state of the art," as used in this case, means that knowledge that was reasonably available at any [16] particular period of time concerning the dangers presented by exposure to asbestos or asbestos containing products or silica or silica containing products.

The defendant railroad was not required to have known everything that is written in the medical or scientific journals. The defendant railroad was under the duty to take reasonable steps to know about available medical and scientific literature to determine the nature and effects of the substances to which its employees were exposed. The law presumes that a person, including a corporation, knows that which, by the use of ordinary care, he could have seen or known had he looked.

Under [FELA] it was the continuing and nondelegable duty of the Norfolk and Western Railway Company and Virginian Railroad to furnish plaintiff with a reasonably safe place in

which to work. By nondelegable, I mean that the railroads could not depend on a third party to satisfy their duty to furnish a reasonable safe place to work.

Some of the plaintiffs may have had exposure to asbestos at places other than those related to their employment with the Virginian and Norfolk and Western [17] Railroad. If you find that the Railroad was negligent and dust exposures at the Railroad contributed, however slightly, to the plaintiff's injuries, you are not to make a deduction for the contribution of non-railroad exposures. The Court will make any deductions which may be appropriate to make.

Section 53 of [FELA] provides:

> In all actions brought against any such common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee . . .

Under this section, it was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. The defendant contends that the injuries sustained by the plaintiffs were caused in whole or in part by cigarette smoking. In addition, the defendant maintains that it was negligence for the plaintiffs to smoke cigarettes and that this was contributory negligence. If a plaintiff knew or had reason to know that smoking cigarettes caused permanent and debilitating lung disease it was negligent to smoke [18] cigarettes or to fail to take reasonable steps to quit smoking when he learned or could have learned of the hazards of smoking.

If you find from a preponderance of the evidence that a plaintiff was negligent and that plaintiff's cigarette smoking caused, in whole or in part, the plaintiff's lung impairment or

injury, then you may find that the plaintiff was contributorily negligent. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

In a [FELA] case, assumption of the risk is not a defense available to an employer. So, the fact that an employee may have known or could have known of an unsafe condition at his workplace which resulted in [19] injuries to him does not mean that the employee was contributorily negligent.

In addition to [FELA], some of the plaintiffs have based a claim on another Federal law called the Boiler Inspection Act or "BIA". That Act provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril of life or limb. . . .

As interpreted under the Boiler Inspection Act,

> "Unnecessary", means that which is not required by the usual circumstances. "Peril", means an exposure to injury or destruction. "Unnecessary peril", as used in the Act means an exposure to injury or destruction which is not required by the usual circumstances of the particular duty the employee is to perform, but which is an exposure to injury over and above that which is usually,

ordinarily or necessarily incidental to the performance of the particular duty.

Under this Act, If you find that the locomotives of the [20] Railroad were not in proper condition and safe to operate in service without unnecessary peril of life or limb to the plaintiffs, then the railroad is absolutely liable for the injuries to the plaintiffs without any regard for or consideration of contributing fault on the part of the plaintiffs.

Before the N&W may be found liable under the Locomotive Boiler Inspection Act, plaintiffs must prove, by a preponderance of the credible evidence, that their injuries, if any, directly resulted from work upon a locomotive or locomotives which were actually in "road service". Locomotives being serviced in a place of repair are not in "road service". Therefore, if you find that plaintiffs injuries, if any, resulted from inspection, repair or servicing of railroad equipment located at a maintenance facility, the defendant railroad cannot be found liable under the Locomotive Boiler Inspection Act. Additionally, the Boiler Inspection Act does not apply where the operation is that of switching, classifying, checking, or assembling cars within railroad yards for the purpose of making up trains.

If you find that the only injury sustained by [21] a plaintiff is from cigarette smoking rather from exposure to dangerous substances at the workplace, then the defendant railroad is not liable to that plaintiff under the Boiler Inspection Act.

DAMAGES

The Court instructs the jury that the fact that instructions are given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the defendant is or is not liable for the alleged injury and damages complained of.

If you find that the defendant is liable to a plaintiff, you must then decide what amount of damages which you believe will fairly and adequately compensate the plaintiff for his injuries.

Each plaintiff who you have found to have been injured as a result of the fault of the defendant is entitled to recover for injury or impairment and physical and mental pain and suffering in the past; any injury and impairment and physical and mental pain and suffering that may reasonably be expected to occur in the future; any loss of enjoyment of the normal pleasures of life; and any medical expenses that may be reasonably expected to be incurred in the future.

[22] You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering. On the other hand none of the plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future. Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer.

In awarding damages, you should not reduce the amount of damages because you may have found a plaintiff contributorily negligent. Any reduction of damages based on the negligence of the plaintiffs will be done by the Court except, if you find that a plaintiff has a reasonable fear of cancer and if you find that the fear was caused, in part, by cigarette smoking, then you may reduce your award for damages for fear of cancer only in [23] an amount that you deem appropriate.

If any award is made to a plaintiff as damages in this case, the award is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of any award made to a plaintiff.

DELIBERATIONS AND VERDICT

Following the arguments of counsel, this case will be given to you for decision. Your first responsibility is to select a foreperson—one of your members who will preside over your deliberations and act as your spokesperson. Following this selection, you should carefully review the testimony and the evidence in order to decide the matters in dispute between the parties.

In order to reach a final verdict, your decision must be unanimous. It must likewise represent the considered judgment of each juror. So, it is your duty to consult with one another and to deliberate with a view to reaching an agreement.

If, after a fair and impartial review of the evidence and after hearing and giving due consideration to the opinions of your fellow jurors, you can reach a [24] verdict which each of you individually and all of you as a jury believe is consistent with the law and the evidence, it is your duty to return such a verdict.

If, during your deliberations you should have a question, please write your question on a paper provided and give it to the bailiff. When you have reached a verdict, the Foreman should endorse your verdict on the appropriate forms and you should then tell the bailiff that you have completed your work and have reached a verdict. Counsel, the parties and I will then gather to receive your decision.

TRIAL TRANSCRIPT
April 27, 1988

Plaintiff's closing argument

* * * *

[45] And that you begin a cell turnover rate that can be a predecessor to cancer, even with that, and then from a human epidemiology standpoint we know that even nonoccupational, nonjob exposures such as family members whose only exposure is to a relatives clothes in the household or something like that, have developed asbestos disease, particularly mesothelioma.

So, just keep that in mind as you hear the evidence on exposure, and I'll have Mr. Boiter talk to you about that now. Thank you.

* * * *

* * * *

[94] So what I want to do now, I'm running out of time, is talk briefly about each individual. You've got the issue for each one of them, of the physical damage up to a third of the lung already compromised, you've got the physical suffering of shortness of breath, and you've got the mental suffering of knowing—living with this and living with the cancer risk, and the evidence about cancer was just introduced just solely for the issue of mental suffering, because we don't and we cannot prove for such which—the table—the risk factor tables would indicate of these six men probably that at least one or two is going to die of cancer, yet, we cannot prove which one.

So you cannot—you cannot compensate them [95] for cancer but you can compensate them for the mental knowledge, and the best way I know how to put it is, and I don't mean to be overly dramatic, but looking around at each other and thinking, who's it going to be? That's part of their mental suffering.

* * * *

[114] So at this point I'm going to let him talk to you about the medical aspect of the cases and then I'll come back and finish; and hopefully, we won't take too long to do this. But again, there are six cases and it will take a little bit of time to go through them

MR. BAKER: Good afternoon, Ladies and Gentleman, it's a pleasure to speak to you again today.

Mr. Adkins, has already discussed with you the essential elements of negligence and causation, the elements that must be proven under the Federal Employer's Liability Act before the N & W can be responsible for any injury.

I'm going to discuss in detail, causation. The simple question for you to answer did exposure to anything at the N & W negligently cause an injury in the plaintiffs.

We've heard over the last couple of weeks the word cancer more than I've heard in the last ten years or so. It's important for you to keep in mind what the Judge instructed you, and that is, that cancer is not a part of this case. None of these plaintiffs have cancer, none of these plaintiffs have what's termed as increase risk of cancer that's compensable.

[115] The cancer evidence was admitted with the ____ of genuine with the fear of cancer claim. When you judge mental anxiety associated with the fear of developing a condition, one thing that you can look for to judge how severe that condition: are there any physical manifestations? I don't think you've heard any testimony in these cases of any plaintiff having any physical manifestation of worry.

Now, I'm sure you all are a representative sample of society at one time or another in your life you've been depressed, you've been anxious about something. There are things that happen—maybe, post traumatic stress disorder is an extreme example, sleeplessness, weight loss, nausea, vomiting. We didn't have any testimony about anything along those lines in any of these cases.

But the plaintiffs did testify that they were concerned about their health and they were concerned that they would happen to them and they would pass on and leave behind their families.

* * * *

[158] Mr. Vance is one of those lucky people that hasn't yet developed a breathing condition in relation to his smoking. Now, that doesn't mean that Mr. Vance's high blood pressure may not have been affected by smoking, or that he may have had other problems associated with his smoking. Because you all know that smoking doesn't cause a single type of problem. It's widely known that it affects a lot of systems of our body.

* * * *

[196] Now, what did he tell you about his shortness-of-breath for the past five to seven years. Put a value on that. What's he going through now with his symptoms? With the cancer risk you've heard about, the worry about that.

* * * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FREEMAN AYERS,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—AYERS

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Freeman Ayers?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	69%
b. Freeman Ayers	31%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, Freeman Ayers, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$913,860.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

CARL BUTLER,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—BUTLER

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Carl Butler?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you find will reasonably compensate the plaintiff, Carl Butler, for the loss he has suffered and may suffer in the future because of his lung injury.

$1,047,000.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DOYLE JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—JOHNSON

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer question No. 5 and 6. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Doyle Johnson?

YES √ NO __

(If your answer to this question is "No", then then you should proceed to answer question No. 5 and 6. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	86%
b. Doyle Johnson	14%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, Doyle Johnson, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$1,230,806.00

6. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, Doyle Johnson?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JOHN SHIRLEY,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—SHIRLEY

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff John Shirley?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you find will reasonably compensate the plaintiff, John Shirley, for the loss he has suffered and may suffer in the future because of his lung injury.

$979,800.00

4. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, John Shirley?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JAMES SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—JAMES SPANGLER

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff James Spangler?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	63%
b. James Spangler	37%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, James Spangler, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$868,500.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

CLIFFORD VANCE,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—VANCE

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff, Clifford Vance?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you fiend will reasonably compensate the plaintiff, Clifford Vance, for the loss he has suffered and may suffer in the future because of his lung injury.

$770,640.00

4. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, Clifford Vance?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-6857

FREEMAN RAY AYERS,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial in the above-referenced matter, the jury awarded the Plaintiff $913,860.00 in damages. The jury also found the Plaintiff to be 31% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $13,903.06.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $11,644.00.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date this judgment order is entered.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $13,903.06 should be reduced by twenty five percent or $1,390.31 for loss of consortium and $2,085.46 for punitive damages for a total reduction of $3,475.77. Thus the offset would be $10,427.29.

Therefore, the verdict ($913,860.00) minus the offset ($10,427.29) results in a net judgment of $903,432.71. This sum reduced by the amount of the Plaintiff's negligence (31%) would result in a judgment for $623,368.57.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $623,368.57 together with interest at the federal rate of interest which shall accrue from the date this order is entered until the sum is paid in ful. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/6/99
DATE

[illegible]
JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
State Bar #5749
James Humphreys and Associates
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Reviewed by:

/s/ Fred Adkins
Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-6876

CARL RICHARD BUTLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial in the above-referenced matter, the jury awarded the Plaintiff $1,047,000.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements total $40,147.21.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $ 8,984.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds in this case that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $40,147.21 should be reduced by twenty five percent or $4,014.72 for loss of consortium and $6,022.08 for punitive damages for a total reduction of $10,036.80. Thus the offset would be $30,110.41.

Therefore, the verdict ($1,047,000.00) minus the offset ($30,110.41) results in a net judgment of $1,016,889.60.

WHEREFORE, it is ORDERED that the judgment shall be and hereby is entered in favor of the Plaintiff for the sum of $1,016,889.60 together with interest at the federal rate of interest which shall begin to accrue on the date this order is entered until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99
DATE

[Illegible]
JUDGE

Prepared by:

/s/ Edward L. Pauley
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Reviewed by:

/s/ Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-8888

DOYLE H. JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $1,230,806.00 in damages. The jury also found the Plaintiff to be 14% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $35,616.58.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $8,594.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $35,616.58 should be reduced by twenty five percent or $3,561.66 for loss of consortium and $5,342.49 for punitive damages for a total reduction of $8,904.15. Thus the offset would be $26,712.43.

Therefore, the verdict ($1,230,806.00) minus the offset ($26,712.43) results in a net judgment of $1,204,093.60. This sum reduced by the amount of the Plaintiff's negligence (14%) would result in a judgment for $1,035,520.40.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $1,035,520.40 together with interest at the federal rate of interest which shall accrue on the date of entry of this order until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99 — DATE

[Illegible] — JUDGE

Prepared by:

/s/ Edward L. Pauley
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Charleston, WV 25301

Reviewed by:

/s/ Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 92-C-8970

JOHN T. SHIRLEY,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation

Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $979,800.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $43,936.76.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $9,144.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $43,936.76 should be reduced by twenty five percent or $4,393.68 for loss of consortium and $6,590.51 for punitive damages for a total reduction of $10,984.19. Thus the offset would be $32,952.57.

Therefore, the verdict ($979,800.00) minus the offset ($32,952.57) results in a net judgment of $946,847.43.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $946,847.43 together with interest at the federal rate of interest which shall begin to accrue on the date of entry of this order and so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99 — DATE

[Illegible] — JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
State Bar #5749
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Reviewed by:

/s/ Fred Adkins
Fred Adkins
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611 Third Avenue
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-7004

JAMES MCCOY SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $868,500.00 in damages. The jury also found the Plaintiff to be 37% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $49,840.66.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $8,484.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $49,840,66 should be reduced by twenty five percent or $4,984.07 for loss of consortium and $7,476.10 for punitive damages for a total reduction of $12,460.17. Thus the offset would be $37,380.49.

Therefore, the verdict ($868,500.00) minus the offset ($37,380.49) results in a net judgment of $831,119.51. This sum reduced by the amount of the Plaintiff's negligence (37%) would result in a judgment for $523,605.30.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $523,605.30 together with interest at the federal rate of interest which shall begin to accrue on the date of the entry of this order and so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99	[Illegible]
DATE	JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
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Reviewed by:

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 92-C-5829

CLIFFORD ARTHUR VANCE,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $770,640.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $33,690.61.

3. The Plaintiff has additional settlements its that are contingent in nature and are not guaranteed payments. These total $12,394.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $33,690.61 should be reduced by twenty five percent or $3,369.06 for loss of consortium and $5,053.59 for punitive damages for a total reduction of $8,422.65. Thus the offset would be $25,267.96.

Therefore, the verdict ($770,640.00) minus the offset ($25,267.96) results in a net judgment of $745,372.04.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $745,372.04 together with interest at the federal rate of interest which shall begin to accrue on the date of entry of this order and shall so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

January 26, 1999 — DATE

[Illegible] — JUDGE

Prepared by:

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Reviewed by:

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SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKETING STATEMENT

Type of Action: √ Civil, □ Criminal
Petitioner(s): □ Plaintiff(s), √ Defendant(s)

Style: CLIFFORD VANCE
FREEMAN RAY AYERS
CARL RICHARD BUTLER
JAMES MCCOY SPANGLER
DOYLE JOHNSON
JOHN T. SHIRLEY, *et ux.*,
Plaintiff(s),

vs.

NORFOLK AND WESTERN RAILWAY COMPANY
Individually and as successor to the Norfolk Southern Railway Company, a Virginia Corporation, *et al.*,
Defendant(s).

Circuit:

County: *Kanawha*

Judge: *A. Andrew MacQueen, III*

Circuit Number: *Thirteenth*

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from: *January 6, 1999*
2. Filing date of any post judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59: *January 19, 1999*
3. Date of entry of order deciding post judgment motion: *February 27, 2001*

4. Date of filing of petition for appeal: *March 12, 2001*
5. Date of filing of amended petition for appeal: August 13, 2001

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits as to all issues and parties? *Yes*
2. If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? Yes □ No √
3. Has the defendant been convicted? N/A
4. Has a sentence been imposed? N/A
5. Is the defendant incarcerated? N/A

C. Has this case previously been appealed? *No*

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court? Yes □ No √

E. State the nature of the suit, the relief sought, and the outcome below. [Attach an additional sheet, if necessary]

Plaintiffs, all retired or former employees of NSRC [1] who worked in various jobs with NSRC, sued Defendant under the Federal Employer's Liability Act (FELA), 45 U.S.C. Section 51, *et seq.* alleging that they contracted asbestosis or mixed dust pneumoconiosis at least

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[1] Effective September 1, 1998, the Norfolk & Western Railway Company was merged into the Norfolk Southern Railway Company and ceased to exist as a separate corporate entity. The Norfolk Southern Railway Company has succeeded to and now owns all of the assets formerly owned by the Norfolk & Western Railway Company and has assumed and is responsible for all of the debts and obligations of the Norfolk & Western Railway Company.

in part as a result of their employment with defendant. Plaintiffs sought only damages for pain and suffering. There were no special damages, and punitive damages are not permitted by the FELA.

The jury found in favor of the plaintiffs, and the award to each plaintiff in these cases is as follows:

Clifford Arthur Vance:	$770,640
Freeman Ray Ayers:	$913,860
Carl Richard Butler:	$1,047,000
James McCoy Spangler:	$868,500
Doyle Johnson:	$1,230,806
John T. Shirley:	$979,800

F. Issues to be raised on appeal. [Attach an additional sheet, if necessary].

Defendant seeks a new trial, on these grounds:

6. The Court erred in not instructing the jury to apportion causation to each of the plaintiffs' potential sources of exposure.

7. The Court erred by consolidating the plaintiffs' individual cases into one trial.

8. The Court erred in refusing to allow the defendant to introduce evidence on state-of-the-art defenses particularly including, but not limited to, evidence regarding the time frame during which manufacturers of asbestos-containing products first warned consumers of the potential hazards associated with exposure to asbestos-containing products.

9. Defendant was precluded from developing evidence to prove that Plaintiffs did not file their lawsuits within the applicable three (3) year statute of limitations.

10. The Court allowed evidence of cancer, risk of cancer and fear of cancer when plaintiffs could not support a claim for cancer or fear of cancer.

11. The Court erred by not granting a new trial or a substantial remittitur of damages.

G. Do you wish to make an oral presentation of the petition? Yes √ No ☐

H. Has the entire or only portions of the record been designated? *Portions*

I. If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record? Reproduced √ Original ☐

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party(s): CLIFFORD ARTHUR VANCE
FREEMAN RAY AYERS
CARL RICHARD BUTLER
JAMES MCCOY SPANGLER
DOYLE JOHNSON
JOHN T. SHIRLEY

Attorney: James A. McKowen, Esquire

Firm: James F. Humphreys & Associates

Address: Bank One Center, Suite 1113 707 Virginia Street, East
Charleston, West Virginia 25301

Telephone: (304) 347-5050

K. Petitioner(s) name: *Norfolk Southern Railway, Company*

L. Attorney or pro se litigant filing Docketing Statement: Attorney

Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless relieved by the court). *Yes*

Name: Fred Adkins, Esquire, and Rodney L. Baker II, Esquire
Firm: Huddleston, Bolen, Beatty, Porter & Copen, LLP
Address: 611 Third Avenue
Huntington, West Virginia 25701
Telephone: (304) 691-8310

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature /s/ Fred Adkins
Fred Adkins
Date 8-13-01

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FREEMAN AYERS	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY	CIVIL ACTION NO. 92-C-8970
CARL BUTLER	CIVIL ACTION NO. 93-C-6876

Plaintiffs/Respondents,

V.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation, et al.

Defendants/Petitioners.

AMENDED PETITION FOR APPEAL

ON APPEAL FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

Fred Adkins, Esquire (WVSB No.: 0076)
Rodney Baker II, Esquire (WVSB No.: 6859)
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AMENDED PETITION FOR APPEAL OF DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY

INTRODUCTION

This Amended Petition is fled by the defendant/petitioner Norfolk Southern Railway Company [1] (hereinafter "defendant" or "NSRC") for Appeal from the judgments entered in favor of plaintiffs/respondents Clifford Arthur Vance, Freeman Ray Ayers, Carl Richard Butler, James McCoy Spangler, Doyle Johnson, and John T. Shirley (hereinafter "plaintiffs") by the Circuit Court of Kanawha County, West Virginia on April 29, 1998 [2]. Because of the errors committed below, this Petition should be granted so that a new trial may be awarded.

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER COURT

These actions were fled under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.*, by six retired or former employees of Defendant. The cases were consolidated for trial over defendant's objection. The plaintiffs alleged that they suffered from shortness of breath and other conditions due to exposure to asbestos and other dusts in their various occupations with defendant and with other employers. *No plaintiff suffered from lung cancer, or from*

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[1] Effective Septeınber 1, 1998, the Norfolk & Western Railway Company was merged into the Norfolk Southern Railway Company and ceased to exist as a separate corporate entity. The Norfolk Southern Railway Company has succeeded to and now owns all of the assets formerly owned by the Norfolk & Western Railway Company and has assumed and is responsible for all of the debts and obligations of the Norfolk & Western Railway Company.

[2] Although a large portion of the trial transcript has been produced, important parts of the transcript have not been produced. In some instances, the only available references are the trial notes of NSRC's counsel.

mesothelioma, but Plaintiffs' main theme during trial was *cancer and fear of cancer.*

Trial was held in this action from April 13, 1998 to April 29, 1998, with the jury finding NSRC negligent and awarding damages totaling five million eight hundred ten thousand six hundred six dollars ($5,810,606). Carl Butler, an employee of NSRC for less than three years with only *three months* claimed opportunity for exposure to asbestos while employed by the railroad, also worked as *a union pipefitter for thirty-three years* with admitted heavy exposure to asbestos during his tenure as a pipefitter, was awarded one million forty-seven thousand dollars ($1,047,000). *TT* Pgs. 8-12, April 29, 1998. Freeman Ayers was awarded damages in the amount of nine hundred thirteen thousand eight hundred sixty dollars ($913,860). *Id.* Doyle Johnson's damage award was one million two hundred thirty thousand eight hundred six dollars ($1,230,806). *Id.* John Shirley was awarded nine hundred seventy-nine thousand eight hundred dollars ($979,800). *Id.* The jury awarded James Spangler damages of eight hundred sixty-eight thousand five hundred dollars ($868,500). *Id.* Clifford Vance was awarded seven hundred seventy thousand six hundred forty dollars ($770,640). *Id.*

Defendant's Motion for Judgment as a Matter of Law, for New Trial, or for Remittitur was denied by Order entered February 27, 2001.[3]

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[3] Apparently an earlier Order entered September 12, 2000 was hand delivered to Judge MacQueen and the Kanawha County Circuit Clerk by plaintiff's counsel. This Order was never provided to NSRC's counsel by the Circuit Clerk of Kanawha County. NSRC's counsel first learned of the September 12, 2000 Order during a January 26, 2001 telephone conference with plaintiff's counsel. In addition, an identical Order entered November 13, 2000 was not received by NSRC's counsel until December 21, 2000. NSRC's counsel promptly filed a Rule 60(b) Motion to Vacate. Judge MacQueen granted NSRC's Motion to Vacate and denied NSRC's Motion for New Trial by Order entered February 27, 2001. It is from the February 27, 2001 Order that NSRC appeals. In any event this Petition is filed within the time period initiated by the entry of the Court's Order of November 13, 2000 which was received by NSRC's counsel on December 21, 2000. On the off chance that this Court finds NSRC's Petition for Appeal untimely, NSRC has filed a West Virginia Rule of Appellate Procedure Rule 2 Motion asking this Court to find good cause for enlarging the time for filing of NSRC's Petition for Appeal.

STATEMENT OF FACTS

Plaintiffs alleged that in their work for Defendant in various crafts they were "exposed" to asbestos, sand and coal dust which caused them to develop asbestosis or mixed dust pneumoconiosis.

Carl R. Butler

At the time of trial, Carl Butler was sixty-six years (66) old with a fifteen year smoking history. *Trial Transcript*, hereinafter "*TT*" Pgs. 198, 199 & 209, April 16, 1998. He worked for NSRC as a machinist apprentice and a carman apprentice for three months in 1951 and for eighteen months in 1956 and 1957 in Princeton, West Virginia, but he testified that he only had an opportunity for exposure to asbestos during the three months that he worked for the railroad in 1951. *TT* Pgs. 200 & 203, April 16, 1998 . The majority of his work career, approximately 33 years, was spent as a union pipefitter with significant exposure to asbestos. *TT* Pgs. 212 & 213, April 16, 1998.

Dr. Gaziano, plaintiff's retained witness, made a diagnosis of mixed dust pneumoconiosis in Mr. Butler's case. *TT* Pg. 183, April 16, 1998. According to Dr. Gaziano, a mixed dust pneumoconiosis is caused by exposure to more than one type of dust. *TT* Pg. 164, April 16, 1998. Dr. Gaziano admitted that Mr. Butler did not tell him that he was exposed to sand or coal dust while employed by the railroad thus, in Dr. Gaziano's opinion, any injury to Mr. Butler caused by sand or coal dust exposure was not caused by his railroad em-

ployment. *TT* Pg. 182, April 16, 1998. Dr. Gaziano admitted that, at most, Mr. Butler's three month opportunity for exposure to asbestos while employed by the railroad played only a minimal role in his alleged development of disease; the majority of his exposure occurred during his 33 year career as a union pipefitter. *TT* Pg. 182, April 16, 1998. Dr. Gaziano testified that Mr. Butler's mixed dust pneumoconiosis caused Mr. Butler to have "a mild obstruction in the throat" which would not prevent him from engaging in the "normal activities as what's usual for someone of his age". *TT* Pgs. 99 & 184, April 16, 1998. The jury returned a verdict in favor of Mr. Butler in the amount of $1,047,000.00. *TT* Pg. 10, April 29, 1998.

Freeman R. Ayers

Freeman Ayers was seventy (70) years old at the time of the trial with a fifty pack year smoking history. *TT* Pg. 3, April 17,1998; *TT* Pg. 100, April 22, 1998. He went to work for NSRC in Princeton in either 1946 or 1947 where he worked as a mechanics helper/laborer for about two-and-a-half years. *TT* Pgs. 8 & 15. After getting laid off from the railroad, Mr. Ayers returned to railroad employment where he worked 10-11 years as a yard brakeman before leaving railroad employment in 1961-62. *TT* Pgs. 16 & 20, April 17, 1998.

Plaintiff's retained witness, Dr. Gaziano, testified that Mr. Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Defendant's expert, Dr. Joseph Renn, testified that Mr. Ayers did not have a pneumoconiosis. *TT* Pg. 98, April 22, 1998. Dr. Renn believed that Mr. Ayers had a mild obstructive lung impairment caused by his 40-50 pack year smoking history.

TT Pg. 100, April 22, 1998. The jury returned a verdict for Mr. Ayers in the amount of $913,860.00. *TT* Pg. 9, April 29, 1998.

Doyle H. Johnson

At the time of trial, Doyle Johnson was sixty (60) years old. *TT* Pg. 5, April 17, 1998. He had a thirty-four to sixty-four pack year smoking history. *TT* Pg. 101, April 22, 1998. He worked primarily as a maintenance of way worker but also as a laborer and welder helper, and maintenance of way worker for NSRC in and around Williamson, West Virginia from 1952 to 1987. *TT* Pgs. 7, 16, 20, & 50, April 17, 1998.

Dr. Renn testified that the plaintiff did not suffer from a pneumoconiosis. Mr. Johnson had a mild obstructive ventilatory impairment and a reduction in diffusing capacity for carbon monoxide caused respectively by asthma and a pulmonary embolus following casting of his knee in 1987. *TT* Pgs. 101, 102, 105 & 106. The jury returned a verdict in the amount of $1,230,806. 00 in favor of Mr. Johnson. *TT* Pgs. 10 & 11, April 29, 1998.

John T. Shirley

John Shirley was sixty-nine (69) years old at the time of trial. *TT* Pg. 03, April 17, 1998. He worked intermittently as a clerk for the railroad from 1947 until 1976 when he took a disability retirement after injuring his back. *TT* Pgs. 6 & 7, April 17, 1998.

Dr. Renn testified that the plaintiff did not a have a pneumoconiosis or a pulmonary function impairment. *TT* Pgs. 117 & 119, April 22, 1998. The jury returned a verdict in favor of Mr. Shirley in the amount of $979,800.00. *TT* Pg. 11, April 29, 1998.

James M. Spangler

James Spangler was seventy-three (73) years old a the time of trial. He reported a one hundred twelve pack year smoking

history to Dr. Renn. *TT* Pg. 81, April 22, 1998. He worked as a pipefitter and carman helper from 1942 to 1950 and from 1955 to 1980 in Bluefield and Princeton, West Virginia. *TT* Pgs. 54 & 55, April 20, 1998.

Dr. Renn testified that Mr. Spangler did not have a pneumoconiosis but instead suffered from a severe cigarette smoking induced broncho-reversible obstructive ventilatory defect which included emphysema. *TT* Pg. 86, April 22, 1998. The jury returned a verdict for Mr. Spangler in the amount of $868,500.00. *TT* Pg. 12, April 29, 1998.

Clifford A. Vance

Clifford Vance was seventy-seven (77) years old at the time of trial. *TT* Pg. 171, April 15, 1998. Mr. Vance worked as a laborer and hostler for NSRC from 1942 to 1969 and from 1967 until 1981 when he took a regular retirement based on his years of service. *TT* Pgs. 174, 181, 184, 189, 190, 191 & 193, April 15, 1998.

Dr. Renn testified that Mr. Vance did not have a pneumoconiosis or a ventilatory impairment despite having a forty-seven to seventy-one pack year smoking history. *TT* Pgs. 108 & 111, April 22, 1998. The jury returned a verdict for Mr. Vance in the amount of $770,640.00. *TT* Pg. 12, April 29, 1998.

ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN SUBMITTING TO THE JURY PLAINTIFFS' "FEAR OF CANCER" CLAIMS, AND IN RECEIVING EVIDENCE OF INCREASED RISK OF CANCER, AND DEFENDANT IS THEREFORE ENTITLED TO A NEW TRIAL

   A. No Plaintiff Had Cancer or Symptoms of Cancer

   B. No Plaintiff Had A Physical Manifestation of Fear of Cancer

II. EXCLUSION OF STATE OF THE ART EVIDENCE INCLUDING EVIDENCE OF WHEN MANUFACTURERS OF ASBESTOS CONTAINING PRODUCTS FIRST PLACED WARNINGS ON THEIR PRODUCTS CONSTITUTES REVERSIBLE ERROR

III. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO APPORTION CAUSATION TO EACH OF PLAINTIFFS' POTENTIAL SOURCES OF EXPOSURE

IV. THE COURT ERRED BY CONSOLIDATING THESE CASES FOR TRIAL

V. THE COURT ERRED IN PREVENTING DEFENDANT FROM INQUIRING INTO ACCRUAL OF THE STATUTE OF LIMITATIONS AND IN REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF LIMITATIONS

VI. A NEW TRIAL OR REMITTITUR IS WARRANTED BECAUSE THE JURY'S VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE GROSSLY EXCESSIVE

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DISCUSSION OF LAW

The Federal Employers' Liability Act, 45 U.S.C., § 51, *et seq.*, is a federal law passed by the United States Congress in 1908 setting forth a compensation scheme for injured railroad workers and limited others. The Federal Employers' Liability Act provides the exclusive remedy for railroad workers and all recovery actions fall within the ambit of the FELA to the exclusion of common and statutory laws of the states. *Erie Railroad Company v. Winfield*, 244 U.S. 170 (1917). The FELA supersedes all state and municipal legislation, including workers' compensation statutes or similar "no fault" recovery statutes. *C&O Railway Company v. Stapleton*, 279 U.S. 587 (1929).

Although the Federal Employers' Liability Act is a legislative act which provides a potential means of recovery for injured railroad workers, it is by no means a strict liability statute or a "no fault" mechanism. For an employee to prevail against his employer in an FELA case, he must satisfy all requirements of a common law negligence case; namely, duty, negligence, causation, foreseeability of harm and damages. *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 879 (1976). The plaintiff's failure to prove any one of these common law elements mandates a verdict for the defendant railroad.

All matters of a substantive nature raised in a FELA case are governed by federal law. All questions relating to recoverable damages, sufficiency of the Complaint and sufficiency of evidence to submit a case to a jury are matters governed by federal law. *Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490 (1980), *Brady v Southern*, 320 U.S. 476 (1943).

While FELA cases may be adjudicated in state courts, decisions of federal courts in interpreting the FELA are

binding on those state courts in their administration of the Act. *Urie v. Thompson*, 337 U.S. 163 (1949). Strictly procedural matters are governed by state law in those FELA cases pending in state courts.

I. THE COURT ERRED IN SUBMITTING TO THE JURY PLAINTIFFS' "FEAR OF CANCER" CLAIMS, AND IN RECEIVING EVIDENCE OF INCREASED RISK OF CANCER, AND DEFENDANT IS THEREFORE ENTITLED TO A NEW TRIAL

Judge MacQueen correctly ruled that plaintiffs could not proceed on their claims for increased risk of cancer because they could not meet the FELA threshold requirement of proving that it was more likely than not that they would develop cancer as a result of their alleged exposures to asbestos. *See The Court's Jury Instruction Charge at Pg. 9.* However, Judge MacQueen then ruled that plaintiffs could recover for "fear of cancer" and plaintiffs were allowed to put on evidence of an increased risk of developing cancer for the purpose of supporting their fear of cancer claims. Under the FELA, a plaintiff cannot recover for fear of developing cancer unless the plaintiff has cancer or symptoms of cancer. Likewise, a plaintiff may not recover for an emotional injury unless he has physical manifestations of the claimed emotional injury. None of the plaintiffs in the instant cases had cancer, a symptom of cancer or manifested symptoms of a claimed fear of cancer.

During pretrial argument on this issue, Judge MacQueen stated "Well, if the Plaintiffs don't get up there and say something like they were scared to death that they're going to die from cancer, and they can't get to sleep then I'm not going to let them get any damages." *TT* Pg. 174 April 14, 1998. Despite a lack of any evidence that any plaintiff had a physical manifestation of a fear of cancer, Judge MacQueen

permitted plaintiff's counsel to put on a continuous stream of evidence relating to cancer and allowed the claims of fear of cancer to go to the jury.

A. No Plaintiff Had Cancer or Symptoms of Cancer

With respect to future consequences of injuries, the FELA follows the general rule that damages are recoverable only if it is *probable* that the future consequences will result; mere possibilities will not do. *See Marchica v. Long Island Railroad Co.*, 31 F.3d 1197, 1202 (2nd Cir. 1994); *Virginian Ry. Co. v. Calhoun*, 200 Va. 908, 911, 108 S.E.2d 239 (1959).

The law regarding fear of cancer as applied in FELA asbestos cases *precludes* any reference to fear of cancer or to risk of cancer absent symptoms of the disease or an actual diagnosis of cancer. *Metro-North Commuter R.R.Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560, 1997 U.S. Lexis 3867 (1997).

Numerous courts have held that risk of cancer in and of itself is not a compensable injury. *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996); *Silkwood v. Kerr-McGee Corporation*, 667 F.2d 908, 919 (10th Cir. 1981) ("complaint based upon the possibility of contracting cancer in the future does not state a common law cause of action"), *rev'd on other grounds*, 464 U.S. 238 (1984); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1502 (11th Cir. 1985) ("None of the appellees had cancer or established that he was reasonably certain to contract it in the future. . . . The challenged evidence [of risk of cancer] thus shed no light on the injury appellees had sustained or were likely to sustain as a result of appellants' alleged negligence.").

In *Watson v. Norfolk & W. Ry. Co.*, 30 Ohio App. 3d 201, 203, 507 N.E.2d 468, 472 (1987), a FELA asbestosis case, the plaintiff's medical expert presented evidence at trial that plaintiff had an "*increased chance*" of developing cancer. *Watson* at 472. The court rejected the evidence, holding that

"an increased chance [of cancer] is a lesser standard than is required under FELA". *Id.* The *Watson* opinion states in relevant part that "[u]nder FELA, a plaintiff may recover damages for fear of developing a harmful condition in the future only when that condition is imminent or would probably occur." *Id.* at 471.

Plaintiffs may argue that a plaintiff cannot recover for fear of cancer if he later develops cancer, but this argument is wholly without merit since such fear, including fear prior to contraction of cancer, is compensable as an element of damages in that second suit. *See Bullard v. Central Vermont Inc.*, 565 F.2d 193,197 (1st Cir. 1977).

No expert witnesses in the cases at bar testified that a plaintiff was more likely than not to develop cancer. No plaintiff testified that he had symptoms of cancer. Without testimony establishing either that a plaintiff had cancer or symptoms of cancer, plaintiffs' fear of cancer claims should have been dismissed in response to NSRC's Motion in Limine on this issue and all evidence of cancer barred from these cases.

B. No Plaintiff Had A Physical Manifestation of Fear of Cancer

The United States Supreme Court adopted the common law "zone of danger" test for recovery for alleged emotional injuries like fear of cancer. The common law "zone of danger" test provides that workers "within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury . . . whereas a worker outside the zone will not." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556; 114 S.Ct. 2396, 2410 & 2411; 129 L.Ed.2d 427, __ (1994).

The Court recognized that "because negligent infliction of emotional distress is not explicitly addressed in the statute

[FELA], the common law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid infliction of emotional injury." *Id.* at 2408. The Court also recognized

> *[M]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover. See, e.g., Garvis v. Employers' Mut. Casualty Co.*, 497 N.W.2d 254 (Minn. 1993) (emphasis added).

Id. at 2407 n.11.

Following *Gottshall*, the Second Circuit recently decided a case which illustrates the boundaries for an emotional injury claim like fear of cancer. The plaintiff in *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197, 1202 (2nd Cir. 1994), unlike the plaintiffs in the case at bar, alleged a claim for negligent infliction of emotional distress. Applying the "zone of danger" test as delineated in *Gottshall*[4], the *Marchica* Court explained, in fear-of-developing-disease cases "the exposure requirement—plus *actual likelihood* of developing the disease—. . . is a means of ensuring the genuineness of the claim." *Marchica*, 31 F. 3d at 1205. In other words, "mental anxiety is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent . . . and a likelihood of

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[4] In *Gottshall*, the Court adopted a very narrow view of claims for negligent infliction of emotional distress. Those claims, the Court stated, are reserved to those cases where severe emotional distress occurs as a result of an impact or threat of physical impact where the plaintiff was within the "zone of danger." As the Circuit Court of Appeals for the District of Columbia emphasized, the emotional injuries presented by a FELA plaintiff must be "serious and verifiable." *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 433 (D.C. App. 1994).

contracting the disease as a result. *Doner v. Adams Contracting Inc.*, 617 N.Y.S. 2d 565, 566 (A.D. 3 Dep't 1994).

The plaintiff in *Marchica* sustained a puncture wound from a discarded hypodermic needle. The court found that because the plaintiff suffered a physical impact he was entitled to receive compensation for his emotional injuries. The court noted that the *Marchica* plaintiff, unlike the current respondents, had physical manifestations of emotional distress such as post traumatic stress disorder, accompanied by sleeplessness, weight loss, and vomiting which was indicia of the genuineness of his emotional distress claim.

No plaintiff suffered from any type of lung cancer. There was no evidence that any plaintiff was more likely than not to develop cancer as a result of his alleged exposure to asbestos. No plaintiff had a physical manifestation of "fear of developing cancer". There was no evidence to "guarantee the genuineness" of plaintiffs' claims of fear of cancer. Despite the lack of any evidence of the type required by the FELA to support a fear of cancer claim, the trial court denied defendant's Motion in Limine on this issue and submitted plaintiffs' fear of cancer claims to the jury. Allowing evidence of increased risk of cancer to support plaintiffs' claims for "fear of cancer" was reversible error and justice requires this Court to grant NSRC a new trial on all issues.

II. EXCLUSION OF STATE OF THE ART EVIDENCE INCLUDING EVIDENCE OF WHEN MANUFACTURERS OF ASBESTOS CONTAINING PRODUCTS FIRST PLACED WARNINGS ON THEIR PRODUCTS WAS REVERSIBLE ERROR

Evidence presented at trial established that the acceptable exposure level for asbestos decreased from the 1940s through the 1990s as the scientific and medical communities learned more about the nature of asbestos. The concept that

knowledge and prevailing standards change over time is commonly referred to as the "state-of-the-art". What NSRC knew or should have known at different points in time is the standard for assessing whether NSRC acted reasonably because "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore and Ohio R. R. Co.*, 372 U.S. 108, 117 (1963). The state-of-the-art evidence in this case was the cornerstone of NSRC's liability defense. Judge MacQueen erroneously prevented NSRC from presenting evidence of when the manufacturers of asbestos-containing products first warned purchasers and end users of the potential dangers associated with the use of asbestos-containing products.

Evidence presented at trial established that asbestos was used by NSRC in varying quantities, at different work sites with varying frequency over a span of years. Dr. Weir testified that NSRC's use of asbestos declined from the late 1950s forward. It is important to appreciate the obvious distinction between NSRC, a purchaser and end-user of asbestos-containing products, and the manufacturers of various asbestos-containing products. As a purchaser and end-user of asbestos-containing products, NSRC had an absolute right to rely on the manufacturers of asbestos-containing products to supply products that were safe for the intended use of the product, i.e. non-defective products. As an end-user, NSRC also had a right to expect that warnings would be provided with or on products that were supplied to NSRC when the manufacturers knew of should have known that the products were dangerous.

During trial, NSRC attempted to put on evidence that manufacturers of asbestos-containing products first placed warnings on their products in the early 1970s through both Dr. Gaziano and Dr. Weir. The court ruled that Dr. Gaziano could testify about general state-of-the-art issues but NSRC

could not question Dr. Gaziano about when the experts, the manufacturers of asbestos-containing products, first placed warnings on their products. *TT* Pg. 21, April 16, 1998.

The trial court believed that the manufacturers of asbestos-containing products knew that asbestos was dangerous before the 1970s but failed to place warnings on asbestos-containing products because the manufacturers conspired to conceal this information from the public to prevent loss of business. *TT* Pgs. 13 & 14, April 16, 1998. Defendant sought to introduce this evidence not to prove the state of the manufacturers' knowledge in the early 1970s, but instead, to show that NSRC did not have warnings about the potential hazards associated with the use of asbestos-containing products in the railroad industry from the most obvious source, the manufacturers of the products, until the early 1970's. *TT* Pg. 63, April 22, 1998.[5]

Under the FELA, the element of foreseeability is extremely important. The United States Supreme Court has determined that "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick*, 372 U.S. 108, 117 (1963). The Court approved an instruction which provided:

> [T]he point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated.

Id. at 118 n. 7.

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[5] Plaintiffs argue that Judge MacQueen would have allowed evidence of the absence of manufacturers' warnings until the 1970's had NSRC offered a witness to say that NSRC relied on the lack of warnings. This was argued by plaintiffs' counsel but never espoused by Judge MacQueen as a basis for preventing the admission of this evidence. *TT* Pgs. 11-21, April 16, 1998.

A FELA plaintiff must prove that his injury was foreseeable. "To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976) (citing *Gallick*, 372 U.S.108, 117, 83 S.Ct. 659, 9 L. Ed.2d 618 (1963). "Negligence which imposes liability must result from a faulty or defective foresight; it is predicated on what should have been anticipated and not merely on what has happened." *Taylor v. Missouri Pacific Railroad Co.*, 510 S.W.2d 735, 737 (Mo. App. 1974).

In short, to prove reasonable foreseeability in a FELA action, the Plaintiff must prove actual or constructive notice to the employer of the defective condition that caused the injury. *Sinclair v. Long Island Railroad*, 985 F.2d 74, 77 (2nd Cir. 1993). In a case "where an employer has no reasonable way to know of the existence of a potential hazard, the employer cannot be held liable for its failure to prevent the hazard." *McKennon v. CSX Transportation*, 897 F. Supp. 1024, 1028 (M.D.Tenn 1995).

Defendant's expert, Dr. Weir testified that the railroad had no reason to know or believe that its employees could be injured by secondary exposure to asbestos until the latter part of the 1970s and by that time the railroad had significantly decreased its use of asbestos-containing products.[6] Plaintiff Carl Butler last worked for NSRC in a position where he believed he may have been exposed to asbestos in *1951, forty-seven years* before his case against NSRC was tried. *TT* Pgs. 200 & 203, April 16, 1998. Freeman Ayers last worked for NSRC in 1961-62. *TT* Pg. 100, April 22, 1998.

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[6] A complete copy of Dr. Weir's testimony was not produced by the court reporter thus this reference to Dr. Weir's testimony is based on NSRC's counsel's recollection.

As a practical matter, the first time that a consumer has reason to believe that a product is or may be dangerous when used in the way that the particular consumer uses the product is when the manufacturer puts a warning on the product or advises the consumer that the product as used by the consumer may be dangerous.

The trial court erroneously prevented NSRC from presenting uncontradicted evidence to the jury concerning the first warnings provided to NSRC by the manufacturers of asbestos-containing products. This information was kept from the jury because the court believed that the manufacturers' deliberately concealed this information from consumers. Whether warnings were withheld innocently or for an improper purpose was irrelevant to the issues in this case. NSRC did not wish to put evidence before the jury as to why the manufacturers did not warn consumers of the dangers associated with asbestos-containing products before the 1970s. The simple fact that warnings were not provided to consumers like NSRC by the manufacturers until the 1970s was the backbone of NSRC's liability defense in these cases because foreseeability of harm is an essential element of negligence under the FELA. Exclusion of this most basic but absolutely essential evidence compels a new trial of these cases.

III. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO APPORTION CAUSATION TO EACH OF PLAINTIFFS' POTENTIAL SOURCES OF EXPOSURE

The trial court denied NSRC's Request for Charge No. 10 which addressed causation by one other than NSRC. The trial court then erroneously instructed the jury that NSRC was financially responsible for the Plaintiffs' entire dust related injury if NSRC caused any part of the injury. Section 51 of the Federal Employers' Liability Act (FELA) provides, in

pertinent part, that common carriers by railroad shall be liable in damages for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ." 45 U.S.C. § 51. Although this statute provides the general rule that a railroad may be liable for an injury to an employee caused by a railroad's negligence, the statute does not explicitly address the issue of whether a railroad is liable for *all* damages associated with a particular claimed injury or health condition regardless of its cause or instead is liable only for the injuries or damages it caused. Since the FELA is silent as to this question, courts must look to federal substantive law for the answer. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994).

In making its erroneous instruction to the jury the trial court relied primarily on *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 493 (1957). However, the *Rogers* case only answers the question of the amount of evidence required to submit a FELA case to the jury. In *Rogers*, the plaintiff's primary duty was to control weed growth alongside the railway by burning the weeds and vegetation alongside the track. The jury returned a verdict for the plaintiff who was injured when he fell into a culvert after he was overtaken by flames and smoke from the weed control fires while watching for "hot boxes" on passing trains. The Supreme Court of Missouri had reversed the verdict for plaintiff on the grounds that plaintiff's own conduct was the sole cause of his accident. *Id.* at 504.

The United States Supreme Court reversed the ruling of the Supreme Court of Missouri because . . .

> . . . [u]nder this statute *the test of a jury case* is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the

> evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, *if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities*. . . .

Rogers, 352 U.S. at 506-507 (1957) (footnotes omitted) (emphasis added).

Rogers concerns *only* the "test of a jury case" and does not set a negligence standard. Neither does it establish the principle that a railroad is liable for the entire amount of damages arising out of an injury or medical condition, even if the railroad only caused a fraction of the damages.

While some courts have misconstrued the holding in *Rogers*, *Rogers* clearly did not set forth the proposition that slight causation on the part of a railroad rendered moot other causes of plaintiff's injuries. *Rogers* merely held that a jury verdict should not be overturned if "the proofs justify with reason the conclusion that employer negligence played any part" in causing the injury or death. *Rogers*, 352 U.S. at 506. As courts have correctly noted, the language from *Rogers* established the test of a jury case under the FELA but does not establish a test for liability under the FELA. Based on this recognition, courts have reversed verdicts in cases where the court has instructed the jury that the railroad is liable for the entire amount of damages without regard to whether other causes also contributed to the injury. *Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989).

The Supreme Court did not hold in *Rogers* that a railroad is liable for 100% of the damages attributable to an injury if the injury was caused in whole or in part by factors unrelated to the railroad's negligence. A plaintiff suing under the FELA must prove that his injury was caused by the railroad's negligence. If a plaintiff proves that his injury was caused, in whole or in part, by the defendant railroad's negligence, then he is entitled to collect only the damages that are attributable to the portion of the injury caused by the railroad's negligence. *See Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989); *See also, Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (plaintiff cannot recover damages which are not proximately caused by defendant's alleged negligence).

The Supreme Court of Pennsylvania in *Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037 (Pa. 1989), held that a railroad is liable only for those injuries caused by its negligence, not for conditions or injuries suffered by the plaintiff that may have resulted from other causes. In *Dale*, as in the present case, Dale alleged that he suffered from a lung impairment due to asbestos-related disease as the result of his exposure to asbestos while employed by the B&O. In response to the medical testimony offered by Dale that his lung condition was caused by asbestos exposure, the B&O offered evidence that Dale suffered from a lung disease that he had contracted prior to his work for the B&O.

The Supreme Court of Pennsylvania recognized that 45 U.S.C. § 51, in isolation, did not explicitly answer the question of whether a railroad is liable for all damages attributable to an injury where the railroad caused only a part of the injury. The Court rationalized that because 45 U.S.C.

§ 53 provides that an employee's contributory negligence shall diminish his recovery in proportion to the amount of negligence attributable to such employee . . .

> . . . it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused.

Dale at 1041.

The Supreme Court of Pennsylvania went on to hold:

> (A)n FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id at 1041.

In *Sauer v. Burlington Northern*, 106 F.3d 1490 (Tenth Cir. 1996), the plaintiff was a railroad conductor who had suffered two workplace accidents and hurt his back in each accident. The jury found the Burlington Northern negligent with regard to the second accident only. On appeal, the plaintiff complained there was insufficient evidence from which the jury could apportion his injuries between his pre-existing back condition and the two workplace accidents.

The Tenth Circuit held there was enough evidence to permit the jury to apportion damages, and went on to say: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment." *Sauer*, 106 F. 3d at 1494 (citations omitted).

In addition, the *Sauer* Court also noted that apportionment can be proved *without expert testimony* stating the percentage of injury attributable to the different causes. *Sauer*, 106 F.3d at 1494. Apportionment is an issue for the jury. *Id*. at 1494.[7]

Two of the six cases involved in this action exemplify the need for apportionment of causation and damages in FELA

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[7] West Virginia judges in FELA trials routinely give clear instructions to juries that a railroad defendant is liable *only* for the damages it has caused, and *is not* liable in damages for other health problems or for the proportion of a plaintiffs injury not caused by the railroad's negligence.

For example, Judge Charles Haden II in *Gradis Boyd, et al. v. CSX Transportation*, U.S.D.C., S.D. of W.Va., Docket No. 3:87-0973 instructed the jury:

> The defendant is not to be held responsible for any hearing loss or tinnitus or both which the plaintiff may have suffered which resulted from any cause other than the negligence proven by the evidence. Any hearing loss or tinnitus which you find to be attributable to any other cause and which was not the direct result of negligence of the defendant, as proven by the evidence, would not be a part of this action and that should not be considered by you.

Judge Kendrick King in *James E. Perry v. N&W*, Civil Action No. 93-C-762, Circuit Court of McDowell County, West Virginia instructed the jury:

> If you find that any of the plaintiff's claimed damages are due in part, no matter how large or small, to any cause other than the defendant's negligence, the defendant is not financially responsible for that other part.

In *Keith Peyton v. CSXT*, Civil Action No. 91-C-101, Circuit Court of Boone County, West Virginia, Judge E. Lee Schlaegel, Jr. instructed the jury:

> In this matter the defendant is only responsible to pay damages to the plaintiff for that portion of his injury, if any, that were caused by its negligence. Therefore if you find that the plaintiff's condition was caused by factors other than the acts or failures to act by the defendant, if any, whether the other cause to be as a result of the plaintiff's own conduct or some other factor the defendant cannot be held responsible for that percentage of plaintiff's condition.

cases. Dr. Gaziano, plaintiff's retained witness, made a diagnosis of mixed dust pneumoconiosis in Carl Butler's case. *TT* Pg. 183, April 16, 1998. According to Dr. Gaziano, a mixed dust pneumoconiosis is caused by exposure to more than one type of dust. *TT* Pg. 164, April 16, 1998. Dr. Gaziano admitted that Mr. Butler did not tell him that he was exposed to sand or coal dust while employed by the railroad thus, in Dr. Gaziano's opinion, any injury to Mr. Butler caused by sand or coal dust exposure was not caused by his railroad employment. *TT* Pg. 182, April 16, 1998. Dr. Gaziano admitted that, at most, Mr. Butler's three month opportunity for exposure to asbestos while employed by the railroad played only a minimal role in his alleged development of disease; the majority of his exposure having occurred during his 33 year career as a union pipefitter. *TT* Pg. 182, April 16, 1998. The jury awarded Mr. Butler one million forty-seven thousand dollars ($1,047,000). *TT* Pgs. 8-12, April 29, 1998.

Plaintiffs' retained witness, Dr. Gaziano, testified that Freeman Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Freeman Ayers was awarded damages in the amount of nine hundred thirteen thousand eight hundred sixty dollars ($913,860). *TT* Pgs. 8-12, April 29, 1998.

In both of these cases, causation of injury between different sources was established by plaintiffs' witness Dr. Gaziano. The trial court instructed the jury that all deductions for non-railroad exposures were to be made by the court not by the jury. *See* Judge MacQueen's Jury Instructions Charge at Pg. 7. The only deductions made by Judge MacQueen were partial setoffs for prior settlements which were of a de minimus nature.

Viewing the evidence in the light most favorable to the plaintiffs, the evidence at trial established that Carl Butler's claimed asbestos related disease was caused minimally, if at all, by his three month opportunity for exposure while employed by NSRC and the majority of his claimed asbestos related injury was caused by his thirty-three year non-railroad exposure history. Mr. Butler's claimed coal dust and silica induced disease was wholly attributed to his non-railroad employment. Mr. Ayers' claimed asbestos related disease was caused equally by his railroad and his non-railroad employment. On these facts, the court's instructions and jury verdict forms required the jury to find NSRC liable for the totality of plaintiffs' injuries if the jury found that plaintiffs' railroad employment contributed "however slightly" to plaintiffs' claimed injuries.

The FELA requires apportionment of causation of injury where a reasonable approximation can be made on the evidence presented. In these cases the evidence established clear partial causation of injury in work sites and situations over which the NSRC had no control. Requiring NSRC to bear the full brunt of the financial awards given to plaintiffs where NSRC had absolutely no control over the circumstance under which a large part of the plaintiffs' claimed exposures to asbestos and other dusts occurred is unconscionable. NSRC should only be required to bear responsibility for injury caused by employment with NSRC. This Court should grant NSRC's Petition for Appeal and order a new trial of these cases with specific instruction to the trial court to instruct the jury to apportion causation.

IV. THE COURT ERRED BY CONSOLIDATING THESE CASES FOR TRIAL

West Virginia Rules of Civil Procedure, Rule 42 (a) in pertinent part provides "[w]hen actions involving a common question of law or fact are pending before the court, it may

order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

West Virginia courts have previously discussed the type of actions which may properly be consolidated under West Virginia Rules of Civil Procedure 42. In *Holland v. Joyce*, 185 S.E.2d 505 (W.Va. 1971), the West Virginia Supreme Court of Appeals held that three civil actions had been properly consolidated for trial since they involved the same transaction or occurrence "to the extent that all involved the single issue of the proper distribution of the assets of the estate of Mary E. McClain, deceased, among her heirs." *Id.* at 510. In *Hawkins v. Glen Falls Ins. Co.*, 171 S.E. 645 (W.Va. 1933), the Court reviewed a case where two defendant insurance companies had been sued by several plaintiffs. The trial court had empaneled two juries to hear the separate claims against the two insurance company defendants. On appeal, the West Virginia Supreme Court of Appeals *disapproved* of this procedure, stating that it was apparent that the lower court obviously recognized the fact that consolidation of the two cases was not warranted. The Court made this observation despite the fact that the contracts of insurance from the two defendants were identical and that the plaintiffs sought recovery due to the loss of property covered by both policies. The Court observed "*under our judicial system every litigant is entitled to his day in court, and to the undivided attention of the court during the hearing of his case.*" *Id.* at 646 (emphasis added).

A state's flexibility and discretion regarding consolidation are limited by the 14th Amendment's requirement that, "at a minimum, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (Harlan, J.); *see also Mathews*

v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (*quoting Armstrong, v. Manzo*, 380 U.S. 545, 552 (1965)).

Improper consolidation of cases, as in this action, can amount to a deprivation of a defendant's due process rights. When consolidation results in prejudice it violates a parties due process rights regardless of any efficiencies that might be achieved. *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920, 926 (1988) (The "paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience [of witnesses] must yield thereto." (*quoting Frasier v. 20th Century Fox Film Corp.*, 119 F.Supp. 495, 497 (D. Neb. 1954))); *Malcolm v. National Gypsum Co.*, 995 F.2d at 350 (2nd. Cir. 1993) ("[t]he benefits of efficiency can never be purchased at the cost of fairness"); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) ("considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"); *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir. 1966) ("[w]here prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error"); *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1454-57 (S.D. Ala. 1992) (granting a new trial because consolidation resulted in prejudice); *Vallero v. Burlington Northern R. Co.*, 749 F.Supp. 908, 913 (C.D. Ill. 1990) ("a court should not order consolidation where the interests of any party would be prejudiced thereby.")

This Court has provided additional guidance in this area by defining criteria for assessing the appropriateness of consolidation. The guidelines include:

1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;

2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits;

3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and

4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

State ex rel. Appalachian Power Co. v. Ranson, 438 S.E.2d 609, Syl. pt. 2 (1993).

In the case at bar, the prejudice to NSRC and the confusion occasioned by consolidation of these cases so outweighed the considerations of judicial dispatch and economy that this Court need only consider the first *Ranson* factor to find that NSRC's due process rights were violated. Courts have repeatedly held that when, as here, there are more factual differences than similarities between cases, consolidation leads to confusion and prejudice. *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460-61 (E.D. Mich. 1985) (ruling that "[w]hen cases involve some common issues but individual issues predominate, consolidation should be denied"); *Henderson v. National Railroad Passenger Corp.*, 118 F.R.D. 440, 441 (N. D. Ill. 1987) (same); *Arroyo v. Chardon*, 90 F.R.D. 603, 605-06 (D.P.R. 1981) (denying motion to consolidate eight cases, when the issues were the same, but the facts of causation were different). The fact that there are *some* similarities only increases the likelihood that the jury

may ignore key distinctions and improperly treat all claims alike. *See Flintkote Co. v. Allis Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1997); *accord, Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 616 (Tex. Ct. App. 1992) (denying consolidation of three cases, because it creates the opportunity to "bootstrap"); *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623 (E.D.Wis. 1984) (denying plaintiff's motion to consolidate five cases, because of varying strength of claims).[8]

Unlike a consolidated products liability case where the plaintiffs need only prove that a defective product was used at a particular worksite, each plaintiff in these cases had to prove that the railroad failed to furnish him a reasonably safe workplace. Resolution of this question for each plaintiff required the jury to evaluate a number of different jobs performed by each plaintiff, at a number of different work places, during vastly different time periods with different claimed exposures and different claimed disease processes.

Carl Butler was sixty-six years old at the time of trial. *TT* Pg. 209, April 16, 1998. He first worked for NSRC for about three months in 1951 as a machinist apprentice in the machine shop in Princeton, WV. *Id.* at Pg. 200. During this time frame Mr. Butler believed that he was exposed to asbestos. *Id.* at 202-203. Mr. Butler next worked for NSRC in 1956 and 1957 as a carman in the car yard at Princeton. *Id.* at 203. As related to Dr. Gaziano, Mr. Butler worked for thirty three years as a union pipefitter with significant exposure to asbestos. *Id.* at 95-96. Dr. Gaziano believed that Mr. Butler

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[8] *See* Bordens and Horowitz, THE LIMITS OF SAMPLING AND CONSOLIDATION IN MASS TORT TRIAL: JUSTICE IMPROVED OR JUSTICE ALTERED?, Volume 22, *Law and Psychology Review*, 43 (Spring 1988); Horowitz and Bordens, THE EFFECTS OF OUTLIER PRESENCE, PLAINTIFF POPULATION SIZE, AND AGGREGATION OF PLAINTIFFS OF SIMULATED CIVIL JURY DECISIONS, Volume 12, *Law and Human Behavior*, No. 3 (1988).

had a mixed dust pneumoconiosis including asbestos lung disease which caused a mild obstructive lung impairment. *Id.* at 99-100. Dr. Renn testified that Mr. Butler did not have a pneumoconiosis and that his pulmonary function was normal. *TT* Pgs. 124, 125 & 127, April 22, 1998.

Freeman Ayers was seventy years old at the time of the trial with a fifty pack year smoking history. *TT* Pg. 3, April 17, 1998; *TT* Pg. 100, April 22, 1998. He went to work for NSRC in Princeton in either 1946 or 1947 where he worked as a mechanics helper/laborer for about two-and-a-half years. *TT* Pgs. 8 & 15.. After getting laid off from the railroad, Mr. Ayers returned to railroad employment at Elmore, WV where he worked 10-11 years as a yard brakeman before leaving railroad employment in 1961-62. *TT* Pgs. 16 & 20, April 17, 1998.

Plaintiffs retained witness, Dr. Gaziano, testified that Mr. Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Mr. Ayers had a career ending heart attack in 1985. *Id.* at 127. Dr. Gaziano believed that Mr. Ayers moderate obstructive ventilatory impairment was caused solely by heavy cigarette smoking. *Id.* at 128. Defendant's expert, Dr. Joseph Renn, testified that Mr. Ayers did not have a pneumoconiosis. *TT* Pg. 98, April 22, 1998. Dr. Renn believed that Mr. Ayers had a mild obstructive lung impairment caused by his 40-50 pack year smoking history. *TT* Pg. 100, April 22, 1998.

At the time of trial, Doyle Johnson was sixty years old. *TT* Pg. 5, April 17, 1998. Mr. Johnson had a thirty-four to sixty-four pack year smoking history. *TT* Pg. 101, April 22, 1998. Mr. Johnson worked primarily as a maintenance of way worker but also as a laborer and welder helper, and maintenance of way worker for NSRC in and around

Williamson, West Virginia from 1952 to 1987. *TT* Pgs. 7, 16, 20, & 50, April 17, 1998.

Dr. Gaziano believed Mr. Johnson's chest x-ray showed "a very minimal change of 1/0" and an asymptomatic pleural plaque. *Id.* at 122. Dr. Gaziano testified that Mr. Johnson had a mild obstruction caused equally by smoking and dust exposure and a reduction in diffusing capacity caused primarily by dust exposure. *Id.* at 124. Dr. Renn testified that the plaintiff did not have a pneumoconiosis but did have a mild obstructive ventilatory impairment and a reduction in diffusing capacity for carbon monoxide caused respectively by asthma and a pulmonary embolus following casting of his knee in 1987. *TT* Pgs. 101, 102,105 & 106.

John Shirley was sixty-nine years old at the time of trial. *TT* Pg. 03, April 17, 1998. He worked intermittently at different locations as a clerk, car supply man, laborer, yard checker, crew dispatcher, extra gang foreman and warehouse foreman for the railroad from 1947 until 1976 when he took a disability retirement after injuring his back. *TT* Pgs. 6, 7 & 8, April 17, 1998.

Dr. Gaziano believed that Mr. Shirley had a mixed dust pneumoconiosis, normal pulmonary function and a reduced diffusing capacity. *TT* Pg. 114, April 16, 1998. Dr. Renn testified that the plaintiff did not a have a pneumoconiosis or a pulmonary function impairment. *TT* Pgs. 117 & 119, April 22, 1998. Mr. Shirley also suffered from nocturnal dypsnea, two pillow orthopnea, and prior heart failure. *Id.* at 114, 115.

James Spangler was seventy-three years old at the time of trial. He worked for NSRC for approximately twenty four years as a pipefitter/sheetmetal worker at Princeton, WV and Narrows, VA. He also worked for the C&O Railroad and had admitted exposure to asbestos while in the Navy. *TT* Pg. 133, April 16, 1998.

Dr. Gaziano testified that Mr. Spangler had an obstructive lung impairment as a consequence of his chronic obstructive pulmonary disease and bullous emphysema both of which were caused solely by cigarette smoking. *TT* Pg. 133-136, April 16, 1998. Dr. Gaziano also found a decreased diffusion capacity which he attributed to both smoking and asbestos exposure. He reported a one hundred twelve pack year smoking history to Dr. Renn. *TT* Pg. 81, April 22, 1998. Dr. Renn testified that Mr. Spangler did not have a pneumoconiosis but instead suffered from a severe cigarette smoking induced bronchoreversible obstructive ventilatory defect which included emphysema. *TT* Pg. 86, April 22, 1998.

Clifford Vance was seventy-seven years old at the time of trial. *TT* Pg. 171, April 15, 1998. Mr. Vance worked as a laborer and hostler for NSRC from 1942 to 1969 and from 1967 until 1981 when he took a regular retirement based on his years of service. *Id.* at 174, 181, 184, 189, 190, 191 & 193, April 15, 1998. He worked at a variety of locations including Iaeger and Bluefield. *Id.* at 174 & 191.

Dr. Gaziano testified that Mr. Vance had asbestosis with a mild degree of pulmonary impairment. *TT* Pg. 76, April 16, 1998. Dr. Renn testified that the plaintiff did not have a pneumoconiosis or a ventilatory impairment despite having a forty-seven to seventy-one pack year smoking history. *TT* Pgs. 108 & 111, April 22, 1998.

Each plaintiff had the burden of proving that NSRC failed to provide a reasonably safe workplace. The evidence to establish this point, as to time frame worked, job performed and location, was markedly different from plaintiff to plaintiff. There was no common question of fact as to whether NSRC provided a reasonably safe work place to each plaintiff.

The evidence of claimed injury presented by each plaintiff was factually specific and different from plaintiff to plaintiff.

Each plaintiff's smoking history was relevant to the individual claims. Each plaintiff's physical condition and prior medical history was different. All of the plaintiffs had different non-railroad work histories which were important facts for the jury's consideration. Consolidation of these cases in light of all the factual differences operated to deprive NSRC of its due process rights by bootstrapping these cases into a single unit which prevented the jury from being able to adequately appreciate and differentiate between these plaintiffs. Accordingly, this Court should grant NSRC's Petition for Appeal and ultimately remand these cases for individual trials.

V. THE COURT ERRED IN PREVENTING DEFENDANT FROM INQUIRING INTO ACCRUAL OF THE STATUTE OF LIMITATIONS AND IN REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF LIMITATIONS

Under the FELA, *the plaintiff* has a duty to prove that his action was timely filed, within three years after the cause of action accrued. *Emmons v. Southern Pacific Co.*, 701 F.2d 1112 (5th Cir. 1983); *Carpenter v. Erie R. Co.*, 132 F.2d 362, 363 (3rd Cir. 1942), *cert. denied*, 318 U.S. 788, 63 S.Ct. 983, 87 L.Ed. 1155 (1943). In a FELA occupational disease case the cause of action accrues when the symptoms of the disease manifest themselves. A FELA plaintiff has an affirmative duty to investigate the nature and cause of his injury once it is known to him. The FELA statute of limitations is found at 45 U.S.C. § 56, which states in pertinent part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." Under the FELA, a cause of action accrues when the plaintiff is or should be aware that he has been injured. This same test applies whether the alleged injury is the result of a traumatic incident which produces immediate results of an injury or

some event or events which produce a purely latent injury in which the results of the injury do not manifest themselves until several years later. *See, Urie v. Thompson*, 337 U.S. 163 (1949); *Young v. Clinchfield Railroad Co.*, 288 F.2d 499 (4th Cir. 1961); *See also, Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986); *Albertson v. T. J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984); *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). As set forth below, in alleged occupational disease cases like the instant action, *the cause of action accrues when the symptoms manifest themselves*. The United States Court of Appeals for the Fourth Circuit in *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498 (4th Cir. 1989) explained the holding of the United States Supreme Court in *Urie* and its own holding in Young:

> The plaintiff in *Urie* claimed years of working as a fireman on a steam locomotive had left him with silicosis; he brought suit against the railroad under FELA. The Supreme Court held that *a cause of action for an occupational disease accrues under FELA only when the symptoms of the disease become apparent to the plaintiff*. The Court stated:
>
> "It follows that no specific date of contact with the substance can be charged with being the date of inquiry, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; *consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . .*" *Urie*, 337 U.S. at 170, 69 S.Ct. at 1025.
>
> To hold otherwise, the Court reasoned, would defeat the legislative intent behind FELA and force blameless plaintiffs to lose their legal remedy simply because they *could not diagnose a hidden affliction* within the applicable statute of limitations. *Id.*

> In Young, we interpreted *Urie* to mean that a cause of action under FELA for an occupational disease does not accrue when the injury is inflicted, but rather when the plaintiff becomes, or should have become, aware of his injury.
>
> . . . The cause of action accrues only when the plaintiff has reason to know he has been injured. Generally this will be when his condition is diagnosed, unless it is shown that the plaintiff 'should have known' at an earlier date that he was injured. 288 F.2d at 503 (emphasis added).

Townley, 887 F.2d at 500-1.

It has been held by the United States Supreme Court and lower federal appellate and district courts that claimants under a federal act generally and FELA plaintiffs particularly have *an affirmative duty* to investigate their alleged injuries after they either know or should know of them. The United States Supreme Court in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), set forth the modern test for assessing the accrual of federal causes of action. In *Kubrick*, the plaintiff had been admitted to a Veteran's Administration Hospital for the treatment of an infection. After surgery, he received an antibiotic which was ototoxic and caused the plaintiff to experience deafness. Subsequently, the plaintiff learned that his hearing loss was due to the administration of the antibiotic, but did not file his Federal Tort Claims Act (FTCA) lawsuit within the appropriate limitations period. On appeal, the plaintiff contended that his cause of action did not accrue until he was aware that the physician at the Veteran's Admistration Hospital had committed malpractice in administering the antibiotic. The Supreme Court rejected this argument, saying:

> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the

> plaintiff that his injury was negligently inflicted. *A plaintiff* such as Kubrick, *armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community*. To excuse him from properly doing so by postponing the accrual of his claim would undermine the purpose of a limitation statute, which is to require the reasonably diligent presentation of tort claims against the Government. . . . [T]he putative malpractice *plaintiff must determine within the period of limitations whether to sue or not*, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, *we discern no sound reason for visiting the consequences of such error on the Defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit*. . . .

Kubrick, 444 U.S. at 123-24 (emphasis added).

The rule stated in *Kubrick* has been applied in cases arising under the FELA. *See Albert v. Maine Central R. Co.*, 905 F.2d 541 (lst Cir. 1990); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986); *Townley v. N&W Ry. Co.*, 887 F.2d 498 (4th Cir. 1989); *Dubose v. Kansas City. Southern Railway Co.*, 729 F.2d 1026 (5th Cir. 1984); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990); *Jones v. Maine Cent. R.R. Co.*, 690 F.Supp. 73 (D.Me. 1988).

In *Townley v. Norfolk and Western R y. Co.*, 690 F.Supp. 1513 (S.D.W.Va. 1988), the District Court determined that the judicial trend is to apply *Kubrick* in FELA cases to determine when a cause of action accrues, saying:

> Although this Court recognizes the harshness of the result, this Court believes that the *Kubrick* standard governs the disposition of this matter: The judicial trend seems to be to apply *Kubrick* in FELA actions to

> determine the running of the statute of limitations. *Kubrick* effectuates a policy of encouraging the prompt presentation of claims and adheres to the purposes of the statutes of limitations. As stated in *Kichline*, "The Court in *Kubrick* cautioned that a plaintiff can and must 'protect himself by seeking advice in the medical and legal community'. . . and 'must determine within the period of limitations whether to sue or not.'" *Kichline*, 800 F.2d at 359.

Townley, 690 F.Supp. at 1515 *affirmed Townlev v. N&W RY. Co.*, 887 F.2d 498 (4th Cir. 1989).

It is not necessary for purposes of accrual under § 56 that a plaintiff have actual knowledge of the extent of his injury or its governing cause. *Fries*, 909 F.2d. at 1096. With respect to injury, a plaintiff need not be formally advised or receive a medical diagnosis by a physician as to the extent of his injury for a FELA claim to accrue. *Frasure v. Union Pac. R.R. Co.*, 782 F. Supp. 477, 480 (C.D. Cal. 1991)(citations omitted). With respect to causation, an injured plaintiff need not have actual knowledge that his injury has been caused by his work. *Fries*, 909 F.2d at 1096; *Albert*, 905 F.2d at 544. Once a plaintiff suffers symptoms of an injury he is under an affirmative duty to investigate his injury and any suspect cause. *Fries*, 909 F.2d at 1095-96.

The law governing accrual of actions under FELA requires "an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause." *Fries*, 909 F.2d at 1094. The court did not allow defendant to conduct an objective inquiry into when the plaintiffs knew or should have known the essential facts of injury and cause.

Plaintiff Carl Butler last worked for NSRC in a position where he believed he may have been exposed to asbestos in 1951, forty-seven years before his case against NSRC was

tried. *TT* Pgs. 200 & 203, April 16, 1998. Freeman Ayers last worked for NSRC in 1961-62. *TT* Pg. 100, April 22, 1998. Doyle Johnson last worked for NSRC in 1987. *TT* Pg. 50, April 17, 1998. John Shirley's last work for NSRC occurred in 1976. *TT* Pg. 7, April 17, 1998. James Spangler last worked for NSRC in 1980. *TT* Pg. 55, April 20, 1998. Clifford Vance last worked for NSRC in 1981. *TT* Pg. 193, April 22, 1998.

The court prevented defendant from inquiry into the symptoms plaintiffs were experiencing that prompted them to contact an attorney. The court also prevented defendant from adducing when plaintiffs first contacted an attorney in regard to their claimed injury.[9] This line of questioning was clearly relevant. It is only logical that plaintiffs must have been experiencing symptoms of their claimed illness at or before the time they contacted an attorney; unless they were experiencing symptoms, which is sufficient under the FELA to trigger the running of the statute of limitations, why would the plaintiffs have sought legal counsel?

The FELA places an affirmative duty on plaintiffs to prove that their cases were timely filed. The court not only allowed these cases to proceed without requiring plaintiffs to affirmatively prove that their cases were timely filed but also deprived NSRC of the opportunity to prove that the cases were not timely filed. After refusing to allow NSRC to develop evidence regarding when plaintiffs first experienced symptoms sufficient to prompt them to contact an attorney, the court refused to instruct the jury on the statute of

[9] Respondents argue that the court only prevented petitioner from inquiring about how plaintiffs met their counsel (mass media solicitation) and that petitioner failed to offer a proffer of evidence on this issue. This issue was extensively argued during the trial. The type of information and the basis for the information petitioner hoped to obtained was laboriously explained to the court. *TT* Pgs.179-184, April 14, 1998 and *TT* Pgs. 27-30, April 23, 1998.

limitations or place this issue on the jury verdict forms. See NSRC's Request For Charge No. 15. This error compels that a new trial be held in these cases with defendant having the opportunity to fully develop the evidence on this issue.

VI. A NEW TRIAL OR REMITTITUR IS WARRANTED BECAUSE THE JURY'S VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE GROSSLY EXCESSIVE

In evaluating whether a new trial is warranted under the facts of a particular case, a court must consider whether any verdict returned in the trial is excessive, thereby justifying a new trial on all issues or, alternatively, a remittitur of a portion of the damage award. Under West Virginia law, a jury verdict is excessive and must be set aside if it is "monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption." *Addair v. Majestic Petroleum Co. , Inc.*, 160 W. Va. 105, 232 S.E.2d 821, 825 (1977). While determining whether a jury's verdict is excessive necessarily "entails a largely subjective exercise on the part of the judge," courts must nonetheless carefully examine jury awards not only to ensure that they are not the result of improper motivation such as passion or prejudice, but also to ensure that the verdict is reasonable in terms of both the facts of the case and the overall system of resolving tort claims. *See Roberts v. Stephens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 800 (1986); *See also Central of Georgia R.R. Co. v. Swindle*, 398 S.E.2d 365, 366 (1990) and *CSX Transportation, Inc. v. Levant*, 417 S.E.2d 320 (Ga. 1992) (FELA cases in which a new trial or remittitur was ordered based on exceptionally large verdicts).

Plaintiffs made no claims for lost wages in these cases. As set forth in the previous section of this Petition, plaintiffs' ages at the time of trial ranged from sixty to seventy-seven,

the diagnoses made by plaintiffs' retained physician were different from plaintiff to plaintiff, the plaintiffs' claimed impairments from both smoking and dust exposure were markedly different ranging from mild to moderate, plaintiffs' claimed fear of cancer was in large part due solely to the plaintiffs' individual smoking histories. The verdicts bear no relationship to the individual factors present in each plaintiff's case and are "monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and manifestly show jury passion, partiality, prejudice, or corruption." The jury's awards must be vacated and a new trial ordered; alternatively, a substantial portion of the jury's verdicts remitted.

RELIEF PRAYED FOR

Significant legal issues are raised in the manner in which Judge MacQueen conducted this trial. This Court has been reluctant to grant appeals in asbestos cases. However, given the number of FELA cases pending in this state and the number of substantive issues raised in this case applicable to FELA cases, this Court needs to provide guidance to the circuit courts on the law applicable to FELA cases. It is clear that inconsistencies exist within the circuit courts on the apportionment issue, state-of-the-art issue, fear of cancer and increased risk of cancer issue, consolidation issue and the substantive differences between FELA and West Virginia Law. One of the primary functions of this Court is to guide circuit courts to prevent inconsistent and ad hoc application of the law as it affects the substantive rights of litigants. This defendant and other railroad defendants with cases pending in various circuit courts of West Virginia have been subjected to this inconsistent application of the FELA. This Court should grant the Appeal in this case to clarify and guide circuit courts in the application of the FELA.

WHEREFORE, Norfolk Southern Railway Company prays that its Petition for Appeal be GRANTED.

NORFOLK SOUTHERN RAILWAY COMPANY

By /s/ Fred Adkins
FRED ADKINS
Of Counsel

Fred Adkins, Esq. (W.V. Bar No. 0076)
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NORFOLK SOUTHERN RAILWAY COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re: FELA ASBESTOS LITIGATION
Case No. CP-84-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

In Re: ASBESTOS-RELATED FELA CASES:
OKLA A. JUDD and
CORA B. JUDD, et al.,

Plaintiffs,

vs.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, a Virginia Corporation,

Defendants.

Nos. 83-3035 83-3036
83-3037 83-3038
83-3039 83-3040
83-3041 83-3042
83-3043 83-3044
83-3045 83-3244
83-3245 83-3246
83-3247 83-3248
83-3249 83-3250
83-3251 83-3252
83-3253 83-3254
83-3255 , et seq.

GERRIT W. H. SCHEPLRS, M.D.

VOLUME 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Nos. 82-2301 through
83-2306, 82-2308 through
83-2317, 83-299 through
83-310, 83-400, and 83-2227

THERESA R. LECHNER, individually
and as Administratrix of the
Estate of GEORGE P. LECHNER,
Deceased,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

No. 82-2897

GLENN E. PERRY and DOLLIE L. PERRY,
his wife,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

DEPOSITION OF GERRIT W. H. SCHEPERS, M.D. a witness, taken on behalf of the Plaintiffs, on the 8th day of October, 1984, at the studios of KMBC-TV, 11th and Central, Kansas City, Missouri.

* * * *

[48] occasions in negotiations on the stipulation, and in fact, I refused to sign the stipulation when part of the stipulation was Mr. White was going to be examining.

MR. JORDAN: I don't think there is anything in the record indicting any objection on behalf of the plaintiffs, so it's our position that they have waved that objection.

MR. MIDDLETON: Richard Middleton for those plaintiffs represented by Middleton & Anderson and Brobyn & Forceno. We adopt the reservations and objections of Mr. Rice as well.

MR. WHITE: Let me just state for the record, your Honor, that no such objections to my taking this deposition have been raised before today either by Mr. Davies or any other counsel representing a manufacturer or anyone in Mr. Rice's firm, and indeed there is no conflict which will be apparent when it's delved into.

(Short recess)

Q. (By Mr. Rice) Dr. Schepers, could you tell us what diseases in human beings are considered to be or can be asbestos-related diseases or occur as a result of asbestos exposure?

A. Simplitus asbetosis, which is the disease of the lungs itself and the pleura around it. That's the mantle [49] around the lung. Secondly, cancer of the lung itself. Thirdly, cancer of the lining membranes of the chest and of the abdominal cavity. And fourthly, cancers in different parts of the body, such as the larynx, that's the throat, of the stomach and the intestinal tract. Those have all been traced back as being caused by asbestos dust.

Q. Doctor, I want to talk with you briefly about the disease known as asbestosis. Could you tell us when the disease was started to be referring to or referred to as the term asbestosis, was named as a disease entity?

A. When it was first—

Q. Named as a disease entity, independent of any other disease.

A. The disease was first described as a clinical condition occuring in workers in asbestos factories in 1899 by the inspectors of factories of the British government. The first case of the disease was subjected to an autopsy analysis, in other words an after-death study of the body, in 1902. It was described in 1904 by Dr. Montague Murray. The asbestos content of the disease, in other words of the lungs, and the fact that it was the asbestos fiber that caused the disease was first recognized in 1924 and from then

* * * *

[52] Only when the cumulative effects of many years of dust exposure or the cumulative effects of the initial exposure with a progression of the disease in relation to that initial exposure, because both factors are involved, only then will the disease become so severe that it can be diagnosed and described as asbestosis, and so in that sense it is a latent disease, yes.

Q. Doctor, if a person, worker, is found to have asbestosis and that person has worked around asbestos dust or with asbestos dust for a period of let's say over ten years, is there any way that you know of to single out or to identify the year that he had the harmful exposure or the particular fiber that is doing the damage? Is there any way to single it out at all?

MR. WHITE: Object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. No, there is not. If the person dies and you can obtain tissue or if you can do an operation on his lung and take a piece of tissue out of the lung, you can identify asbestos fibers of a specific type. You can, for instance, determine by means of an electron microscope whether the fiber is this type of fiber or that type of fiber, but you won't be able to say

when that fiber reached the lung. Because it could be the fiber—the first fiber that got into his lung that you are looking at or it could be the last one that you are looking at.

Q. (By Mr. Rice) Doctor, are asbestos-related diseases, and particularly asbestosis, are they considered to be progressive diseases?

A. Yes, they are invariably progressive in the sense that the asbestos fiber tends to remain in the lung tissue and tends to irritate and damage the lung tissues as time passes and irritate the new fibers that—the new cells that are formed in the lung. The lung keeps on forming new cells. It's what you call a deciduous organ, in other words, it replaces itself every so often. And so there are constantly new cells and structures formed in the lung, but since the asbestos remains behind, the asbetos, which is already there, will keep on damaging these new cells, and so in that way more and more disease process is created.

Q. Doctor, does science at any point in time, is science aware of a method to go into the lung and remove the asbestos fibers that are in the lung?

A. No, there is no known way of removing the asbestos. There have been experiments made to attempt to neutralize them with different chemical substances, but none of these experiments have been successful.

* * * *

[86] here the documents we just read so that the jury may read them with us. I believe, Doctor, pointing now to the board we read the first three paragraphs here; is that correct?

A. Yes.

Q. All right. Doctor, this whole discussion about pneumoconiosis, is this consistent with what you understood the disease process of pneumoconiosis to be in the 1930s?

A. Yes.

Q. Let me show you Page 62 of the 1932 Medical and Surgical minutes.

MR. WHITE: Your Honor, we object to the use of a pointer by Mr. Rice. We object to the form of the question in the terms of his using the pointer.

MAGISTRATE HAMILTON: Overruled.

Q. (By Mr. Rice) Doctor, there's a statement here on Page 62 that says dust inhalation renders the lung susceptible to reoccurrent infection and to tuberculosis—and tuberculosis is also superimposed particularly in the second and third stages. Do you see that?

A. Yes, sir.

Q. Does asbestosis render the lung suceptible to additional infections and additional damage?

[57] A. Yes, it does.

Q. Has it always been known to do so?

A. Yes, sir.

Q. Doctor, I believe we also read the paragraph dust pathology of the lungs can be prevented in two ways, talked about wet down and ventilation. Has that always been a concept, in order to prevent dust disease you prevent exposure?

A. Yes.

Q. Is that the way you understood it in the 1930s?

A. Yes.

Q. Doctor, reading in the last paragraph or the conclusion of that section entitled Dust As An Industrial Hazard presented in 1932 by the Medical and Surgical Section of the Aerican Railway Association.

A. Well, what it says there is in conclusion we wish to emphasize the fact that under certain conditions inhalation of dust causes a fibrosis of the lungs known as pneumoconiosis and that this is an industrial hazard but that it can be prevented by proper use of water and ventilation, that after

fibrosis develops secondary infection is prone to occur and tuberculosis is often ingrafted on the fibrosis and the radio graphic examination is the easiest and most reliable means of diagnosis.

* * * *

[118] Q. Doctor, I want you to focus with me on the threshold limit value of five million particles per cubic foot of air; and I ask you, sir, if you can see the dust in the air, does that quantity of dust exceed five million particles per cubic foot of air.

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. If you can see the dust with your naked eye, then the amount of dust particles of the kind we are talking about would be in the range of many hundreds of millions of dust particles, more nearly 700 million particles of dust. This is many, many multiples of even the largest thresholds limit value that has been proposed in connection with asbestosis. The largest number I know of is, as far as I recall, 10 million particles per cubic foot of air. Well, you would not see that in the air. It would be invisible.

Q. (BY MR. RICE) Doctor, was the concept of the TLV to be taken independent of other preventive measures or were they to be ruled as—together as an engineering guideline?

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

* * * *

[121] for you in the area of asbestosis. I would like now to talk with you a bit about the other—one of the other diseases you have told us was related to asbestosis, that being cancer of the lung.

A. All right.

Q. Sir, if a individual worker has an occupational exposure to asbestos, can you state within a reasonable degree of medical certainty whether or not that worker has an increased risk of developing bronchgenic carciroma or lung cancer—

MR. WHITE: I object to the form of—

Q. (BY MR. RICE)—relating to the asbestos?

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. Yes.

Q. (BY MR. RICE) and what is that opinion based on, doctor?

A. It's based on the historical demonstration through publications and scientific studies, as that there is increased prevalence of lung cancer in persons who have asbestosis from about 1933 onwards. There have been publications by different doctors correlating the occurrence of asbest—of cancer in persons with asbestosis; and this correlation built up over the [122] years, that past, so that progressively it became evident that a high percentage of persons with asbestosis have lung cancer. In fact, such a high percentage that it was exceptional for any industry comparable to the asbestos industry. It was exceptional for any disease comparable to asbestosis. No other cust-caused disease has as much cancer of the lung associated with it as asbestos does, and that became progressively known through the early 1930s and the early 1940s.

There were also experiments made by scientists who exposed animals to asbestos dust and who demonstrated from about 1942 onwards in Germany by Dr. Noromann, in the Saranac Laboratory by Dr. Gardner, that the mere exposure of certain animals to asbestos dust, apart from the disease,

asbestosis, leads to cancer of the lungs of those animals. Those two bodies of knowledge eatablished by 1949 the perception in the Journal of the American Medical Association, in its editorial, that asbestosis and asbestos exposure are associated with lung cancer.

Q. Okay.

A. Various countries started making laws, workmen's compensation laws, declaring lung cancer occurring in association with asbestosis to be [123] compensable, as if they were caused by the dust. For instance, Germany in 1942, and Czechoslovakia in 1945, England in 1953, South Africa in 1955, and so forth.

Q. Doctor, this question may seem somewhat repetitious to you, but I need to ask it for the rules that we have to follow in court. Doctor, do you have an opinion within a reasonable degree of medical certainty, based upon your education, your experience, your study, and your knowledge of the medical and scientific literature, as to when it was known and knowable in the medical and scientific community that there was an association between asbestos and lung cancer in human beings?

UNIDENTIFIED SPEAKER: I object to the form.

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. Yes, I have such an opinion.

Q. (BY MR. RICE) And can you tell us what that opinion is, please, sir?

A. I think that knowledge was available from the 1945 period on. There was no question about it.

Q. Doctor, let me call your attention back to the AAN documents for one moment. I want to look with you

* * * *

Supreme Court, U.S.
FILED
JUN 17 2002
OFFICE OF THE CLERK

(10)

No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the Federal Employers Liability Act ("FELA") without proof of physical manifestations of the claimed emotional distress?

2. Where there is evidence that a plaintiff's injury and damages have non-railroad causes, does FELA permit reasonable apportionment so that the railroad is responsible only for those damages attributable to its own negligence?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below and are respondents in this case:

Carl Butler

Doyle Johnson

John Shirley

James Spangler

Clifford Vance

RULE 29.6 STATEMENT

Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

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OPINION BELOW

After a jury verdict for respondents, the Circuit Court of Kanawha County denied petitioner Norfolk & Western Railway Company's ("N&W") new trial motion on February 14, 2001 in an unpublished order. Pet. App. 3a-5a. The Supreme Court of Appeals of West Virginia denied N&W's Petition for Appeal on October 4, 2001. The supreme court's order is unpublished, and is reproduced at Pet. App. 1a-2a.

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on October 4, 2001. N&W filed its petition for certiorari on January 2, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The relevant provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, 53 and 56, are reproduced at Pet. App. 6a and 7a.

STATEMENT OF THE CASE

At issue in this case are two fundamental rulings arising under FELA, which if not corrected will expose railroads to enormous and wholly unwarranted liability for injuries claimed by their employees. The first ruling is that employees can recover virtually unlimited damages for emotional distress based on a claimed "fear of cancer" from contracting asbestosis even without showing any physical signs of an emotional injury. The second ruling deprives the railroad of the right of apportionment that would limit its liability to those injuries and damages it actually caused. The effect of these rulings was an enormous jury award totally out of proportion both to the employees' injuries and to the

railroad's responsibility. Accordingly, the Court should vacate the judgments and remand for a new trial.

Respondents are six former railroad employees who brought suit under FELA against their former employer N&W alleging negligent exposure to fine occupational dust, particularly asbestos. Claiming asbestosis, an asbestos-related lung disease, they sought damages for, among other things, a fear of contracting cancer in the future. Petitioner does not challenge the jury's implicit findings that respondents had contracted asbestos-related disease. However, in determining the legal standard for assessing the genuineness of emotional-distress claims, this Court must understand the minimal proof of disease that triggers staggering recoveries for relatively healthy plaintiffs like respondents.

1. Asbestos Disease And Litigation. For much of this century, asbestos was in common use in virtually every industry, especially to insulate high-temperature equipment. By the 1930s, there was a growing recognition that exposure at extremely high levels to asbestos and other fine occupational dusts could create health risks. See W. Morgan & A. Seaton, *Occupational Lung Diseases* 312-13 (3d ed. 1995); JA 366-69. Later scientific studies revealed that asbestos fibers were pathogenic at much lower levels than previously believed, leading eventually to the effective eradication of asbestos from the workplace. See A. Churg & F. Green, *Pathology of Occupational Lung Disease* 281-82 (2d ed. 1998).

Asbestos is associated with several disease processes, including pneumoconiosis,[1] lung cancer (cancer of the lung

[1] "Pneumoconiosis" is a general term that refers to a number of lung diseases (asbestosis, coal workers' pneumoconiosis and silicosis being the most common) that arise from the inhalation of fine occupational dust. Pneumoconiosis occurs when inhaled particles not intercepted by the body's natural defense systems are permanently deposited in the lung and

tissue), and mesothelioma, which is a rare cancer of the pleura (the lining of the lung) or peritoneum (the lining of the abdominal cavity). See R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985). There is no established connection among these disorders—that is, asbestosis does not turn into cancer—and it is widely recognized in the medical literature (and in the courts) that asbestosis and asbestos-related cancers are separate diseases. See, *e.g.*, Churg & Green, *supra*, at 313 (asbestos-related diseases are a "disparate set of diseases with different epidemiologic, pathogenetic, pathologic, and prognostic features"); *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983). Asbestosis (like other forms of pneumoconiosis) is dose-related; its development is tied directly to the intensity and duration of asbestos exposure. See F. Speizer, *Environmental Lung Diseases*, *in Harrison's Principles of Internal Medicine* 1176, 1178 (Isselbacher et al. eds., 1994); Morgan & Seaton, *supra*, at 328. Although pneumoconiosis can have severe effects, in many cases it results in virtually no impairment. See Churg & Green, *supra*, at 316; Morgan & Seaton, *supra*, at 149; see also, *infra*, at 8-9.

Asbestosis can be clearly identified by analysis of removed lung tissue, yet its clinical diagnosis in living patients requires expert judgment; misdiagnosis is thus common, even outside the litigation context.[2] First, the authoritative American Thoracic Society ("ATS") guidelines require "a reliable history of [asbestos] exposure" and a minimum latency period

cause scar tissue to form, thereby interfering with the lungs' ability to function at their optimal capacity. *See* Morgan & Seaton, *supra*, at 321, 324.

[2] *See* R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. Occ. Med., 1088, 1089 (1990); Morgan & Seaton, *supra*, at 323; Churg & Green, *supra*, at 325 (noting the tendency of medical personnel to regard as asbestotic any individual with diffuse lung disease where there is a reported history of asbestos exposure).

from first exposure of 20 years, and additionally "recognize[the] value" of four other factors.[3] Because of the vague wording of the guidelines (now under reconsideration), medical opinion varies as to what constellation of factors is necessary to support a diagnosis of asbestosis. JA 239, 456-57. Second, distinguishing asbestosis from other forms of pneumoconiosis is difficult, especially where, as here, an individual has been exposed to multiple occupational dusts. Although there are some distinctive patterns, signs of asbestosis as detected by chest x-ray resemble over 100 other lung disorders, including scores caused by other dusts, and are often confused with radiographic abnormalities attributable simply to smoking and old age.[4] Moreover, the breathing tests for the second and third ATS-recommended factors depend on patient effort and are therefore subject to inaccuracy. Morgan & Seaton, *supra*, at 323. Thus, many individuals diagnosed with asbestosis actually have far more benign conditions. See *Raymark Indus., Inc.* v. *Stemple*, No. 88-1014-K, 1990 WL 72588, at *6-*9, *29 n.11 (D. Kan. May 30, 1990). Indeed, in a 1990 study, independent academic researchers concluded that only 11 of 439 individuals previously diagnosed with an asbestos-related

[3] *See* Am. Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 Am. Rev. Respir. Dis. 363, 368 (Official Statement of the American Thoracic Society 1986), JA 525. The four factors are (1) radiographic evidence of specified kinds of irregular opacities on the lung of a "profusion" of 1/1 or greater (on a continuous scale of lung clarity from 0/- (clear), 0/0, 0/1, etc. to 3/3, 3/+ (clouded)); (2) a restrictive pattern of lung impairment with abnormally low "forced vital capacity" (*i.e.*, the total volume of air expired after a deep breath); (3) abnormally low diffusing capacity (a measure of exhalation); and (4) bilateral crackles at the posterior lung base not cleared by cough. *Id.*

[4] *See* R. Parloff, *The $200 Billion Miscarriage of Justice*, Fortune, Mar. 4, 2002, at 162; Morgan & Seaton, *supra*, at 317, 324 (citing W. Weiss, *Cigarette Smoke, Asbestos and Small Irregular Opacities*, 130 Am. Rev. Respir. Dis. 293 (1984) & J. Dick et al., *The Significance of Small Irregular Opacities in The Chest Radiograph*, Chest 102, 251 (1992)); Churg & Green, *supra*, at 325; JA 418.

disease (*i.e*, under 3%) had been correctly diagnosed. Reger et al., *supra*, at 1089. Significantly, many conditions similar to asbestosis (including other forms of pneumoconiosis, such as silicosis) are not associated with as great an increased risk of lung cancer. Morgan & Seaton, *supra*, at 239.

These difficulties are compounded and exploited in asbestos litigation, as has been well documented by the national press.[5] Claims of the truly sick against (now mostly bankrupt) asbestos manufacturers have been supplanted by claims against product users, like petitioner, by minimally impaired individuals, absorbing both available funds and judicial resources. See Parloff, *supra*, at 164 (47 to 1 ratio of noncancer to cancer cases). The plaintiffs' bar generates potential plaintiffs with mass solicitations and free x-ray screenings, and medical experts in the hire of the plaintiffs' bar commonly diagnose those who manifest even the slightest lung scarring as asbestotic. See, *e.g.*, *Raymark Indus.*, 1990 WL 72588, at *5; Warren, *supra*; Parloff, *supra*, at 164.

Liberal venue rules (including FELA's, see 45 U.S.C. § 56) enable lawyers to file claims in plaintiff-friendly jurisdictions like West Virginia. Parloff, *supra*, at 162, 164; Pet. at 25. At trial, because the ATS guidelines "recognize[the] value" of (but do not explicitly require) the four medical-evidence factors noted above, see *supra* note 3, the plaintiff's expert (as respondents' expert did here) will commonly diagnose asbestosis from any claimed medical evidence of scarring so long as the two required patient-history factors are satisfied. Those factors, a reliable history of exposure to asbestos and a sufficient period from first exposure, rely entirely on the

[5] The leading articles documenting these practices have been reproduced in the Lodging of Petitioner filed with the Court: S. Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 24, 2002, at A1; B. Richards & B. Meier, *Widening Horizons: Lawyers Lead Hunt for New Groups of Asbestos Victims*, Wall St. J., Feb. 18, 1998, at 1; Parloff, *supra*; A. Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1.

subjective accounts of the plaintiffs and are accepted at face value by the clinician. JA 220, 431-32. If medical evidence is put at issue, there exists a surreal situation in which the jury decides the meaning of chest x-rays—which cannot be read except with extensive training, JA 412-14—based on experts' warring accounts of the proper identification and classification of opacities and their profusion in the lung. Plaintiffs' lawyers stoke the passions of jurors with arguments regarding an asbestotic's risk of deadly cancers. The common results, even for those with scant evidence of asbestosis, are massive verdicts for relatively healthy plaintiffs. See Parloff, *supra*, at 157 ($25 million FELA verdict in Mississippi for healthy railroad employee who claimed asbestosis).

2. Proceedings Below. Respondents' suits are consistent with the national pattern. Most of the respondents were parties to mass complaints of hundreds of plaintiffs, many from out of state. JA 4-10, 41-46. For the most part, respondents did not rely on evidence from treating physicians, but instead on the diagnoses of the expert retained by their lawyer. JA 167.

At trial it was contested whether any of the respondents had an asbestos-related disease. N&W's medical expert testified that *none* did, JA 426-55, and indeed only two of them had even one of the ATS-recommended factors; his evaluations were consistent with prior qualified readings of certain respondents' chest x-rays. JA 430-31, 449. Moreover, all but one of the respondents were long-term, heavy smokers, each smoking one or two packs per day for anywhere from 10 to 50 years. JA 426, 433, 437, 442, 451. Smoking and respondents' various medical and physical conditions had effects on their lungs that resembled the markers of asbestosis. JA 429, 439, 441-42.

Respondents' expert disputed the proper standards for evaluating breathing tests and the classification of the x-rays, JA 162-67, 240 (even though he conceded that two of the

respondents' x-rays did not meet the ATS-recommended standard, classifying them at the minimum level of abnormality, JA 198-99, 229). Moreover, all but one of his diagnoses of asbestosis were based on the thinnest of evidence. For Ayers, he conceded the absence of ATS-recommended criteria.[6] For Shirley, the expert conceded that the x-ray opacities were not typically associated with asbestosis, and thus stated he was unable to make a straight diagnosis of asbestosis. JA 224-25. Nonetheless, he diagnosed "mixed dust pneumoconiosis" consistent with asbestosis because he purported to find scarring, and because Shirley (who worked principally as an office clerk for 25 years but claimed to have moved bags of asbestos occasionally during his "on and off" work as a car supply man from 1947-1951) reported exposure to asbestos. JA 192-93, 221-25, 284-86.

Respondents' accounts of railroad asbestos exposure were riddled with vagueness and imprecision, often lacking in details about specific periods or direct exposure. See, *e.g.*, JA 250, 269, 286. Some testified that they could see dust at times, see, *e.g.*, JA 250-51, 286, even though health risks depend not on visibility but respirability. See JA 85. The

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[6] Respondents' expert gave the following testimony about his examination of Ayers:

Q: "[W]ere his lungs clear . . . ?"
A: "Yes, sir. . ."
Q: "What was the chest x-ray reading on him, sir?"
A: "1/0" [lower than the ATS recommended figure of 1/1, *see supra* note 3].
Q: "Did you find a restrictive pattern of lung impairment? Was the forced vital capacity below the lower limit of normal?"
A: "No, sir, I did not."
Q: "Did you find a diffusing capacity . . . when correct[ed] . . . [that] would be normal, isn't that true, Doctor?"
A: "Yes, sir."
Q: "Did you find any bilateral laked or pin crackles?"
A: "No, sir, it was normal . . ."

JA 229.

exposures to which most respondents testified were sporadic at best. The most striking testimony, besides that of Shirley the office clerk, came from Respondent Butler. He testified that of the 23 months he worked for the railroad, he might have been exposed to asbestos over a three-month period but he "couldn't say" for sure. JA 250, 251. Even respondents' medical expert stated that Butler's railroad exposure made only a "minimal" contribution to his claimed asbestosis. JA 237.

Respondents also testified about direct asbestos exposure while employed in other industries. In contrast to his two months of employment and three months of possible exposure as a railroad employee, Butler was employed for 33 years as a pipefitter in chemical plants and paper mills, during which time he reported "significant" exposure to asbestos. See JA 252. Respondent Ayers recalled actually mixing asbestos during the course of his decades of employment at an auto bodyshop. See JA 274-75; see also JA 205 (Spangler).

Respondents did not testify to any economic damages resulting from asbestos exposures. Nor did they testify to any severe impairment. Rather, each alleged only experiencing shortness of breath. See JA 294 (Shirley), 275-76 (Ayers), 253-54 (Butler), 114-15 (Vance), 353 (Spangler), 330 (Johnson).[7] In fact, respondents' medical expert testified that Butler and Vance were not precluded from taking part in any normal activities for men their age. See JA 219-20 (Vance), 238 (Butler), 186 (Butler's disease is "very mild"). Butler

[7] Notably, several respondents have medical conditions, altogether independent of asbestos-related disorders, that contribute to their impairments. Butler pointed to rheumatism and arthritis as additional causes of his shortness of breath, *see* JA 256; Shirley testified that he recently underwent heart surgery, JA 297, and had arthritis, JA 296; Spangler had emphysema, JA 427; and Vance had chronic bronchitis, JA 217. Testimony at trial also established that shortness of breath could be caused by obesity and heart problems, two conditions afflicting certain respondents in this case. *See* JA 448, 454.

continued to farm over one hundred acres, and Spangler testified that he continued to actively manage two dozen rental properties. See JA 358 (Spangler), 454 (Butler).

It was also contested whether any respondent suffered any emotional distress over the possibility of developing asbestos-related cancer. Respondents presented no objective evidence of a fear of cancer. While some testified to varying degrees of "concern" over developing the disease, JA 277 (Ayers), 298-99 (Shirley), 255 (Butler), 116-17 (Vance), others did not provide even this level of subjective testimony: Spangler did not testify to having any concern about cancer. Shirley testified that he was more concerned about shortness of breath than developing cancer. JA 298-99. When plaintiffs' counsel asked Johnson if he was worried about developing cancer, he replied, "No, sir. I just have to . . . " at which point he was cut short by his attorney. JA 332. None testified to any physical manifestation of emotional distress.

Because it was uncontroverted that respondents had neither cancer nor a reasonable likelihood of developing cancer, or any physical manifestation of emotional injury related to cancer that would be required to prevail on a claim of negligent infliction of emotional distress, N&W moved prior to trial to exclude all evidence regarding cancer as irrelevant and highly prejudicial. JA 52-53. The court denied the motion, Trial Tr. at 251 (Apr. 14, 1998), and respondents' expert testified in detail about the "very painful" nature of mesothelioma and its deadliness for workers and exposed family members. JA 154. The court later rejected N&W's proposed jury instruction that would have required jurors to find some physical manifestation of fear before awarding damages to respondents. JA 547-48. Instead, the court instructed the jury that "any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear," and that damages may be awarded for emotional "pain and suffering" related to

physical injury without any requirement of objective corroboration. JA 573. Given the minimal physical harms suffered, during summation respondents' counsel repeatedly urged the jury to compensate them for their cancer fears. JA 576-77.

The jury returned a verdict in favor of the six respondents, awarding them $5,810,606 in the aggregate. The court had instructed the jury to assign a percentage of fault attributable to certain respondents' contributory negligence, see 45 U.S.C. § 53, and after verdict it entered judgments reflecting these reductions and settlement offsets. JA 590-613. The trial court denied without opinion N&W's new trial motion challenging, *inter alia*, respondents' entitlement to recover fear-of-cancer damages and the court's instruction on apportionment among causes. The West Virginia Supreme Court denied N&W's petition for review without comment. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The judgments rendered below offend fundamental limitations on railroad liability under FELA. Both independently require a new trial.

1. The court below erroneously allowed respondents to recover for purported fear of cancer as pain-and-suffering damages arising from asbestosis. But this Court made clear in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), that pain-and-suffering damages are limited to emotional distress stemming directly from physical injury, and this Court held in *Buckley* v. *Metro-North Commuter Railroad*, 521 U.S. 424 (1997), that fear-of-cancer damages in the absence of cancer may be awarded (if at all) only if the requisites of the independent tort of negligent infliction of emotional distress are met.

Respondents are precluded from recovering such damages based solely on evidence of asbestosis. The standards

governing negligent-infliction claims under FELA are informed by the historical and evolving common law, which have always imposed two types of restrictions on recovery for emotional distress. First, the common law limited the class of plaintiffs eligible to bring such claims. Accordingly, this Court in *Gottshall* held that only plaintiffs who were in the zone of danger—who had either suffered a "physical impact" or had been at immediate risk thereof—could seek recovery, and ruled in *Buckley* that mere asbestos exposure did not qualify as a "physical impact."

This case implicates the second common-law restriction that was not at issue in either *Gottshall* or *Buckley* but that must be recognized under FELA: *viz.*, the requirement that plaintiffs prove severe emotional injury from trauma that is corroborated by physical manifestations of the emotional injury. Severe emotional injury is a baseline requirement for recovery, common to both intentional and negligent infliction of emotional distress, and is required in virtually every jurisdiction; moreover, it must be objectively reasonable for the plaintiff to have suffered severe emotional injury from the defendant's tortious conduct.

The compensable-injury requirement is fatal to respondents' claims for recovery. First, the common law has traditionally permitted negligent-infliction claims only from immediate trauma, and there is no warrant for extending this cause of action to knowledge-based fears generated by information about incremental statistical risk of cancer. Even if FELA were to allow recovery for knowledge-based distress, a plaintiff still could not recover if he was misinformed. The law would have to impose a duty on the plaintiff to assess his own personal risk based on current epidemiology, an unworkable rule given the incomprehensibility of epidemiology to the ordinary person; the uncertainty and flux in the scientific understanding of asbestos cancer risks; and the intrinsic complexity of translating any statistical data into personal risk.

Second, the most recent studies show that asbestos-related cancer risks are much smaller than previously thought, and may add little incremental risk except in occupations where exposures are particularly heavy. Especially when measured against the high background cancer risks every individual faces, and the special risks faced by long-term smokers (like most respondents), as a matter of law this is not the kind of information that reasonably causes severe emotional injury to the normally constituted person.

Moreover, FELA requires not only that emotional injury be severe, but also that the distress be physically manifest in bodily harm or illness. That was the rule at the time FELA was enacted and is the prevailing modern rule, and it serves the longstanding policies against feigned and trivial claims. Such a requirement is not obsolete, or inconsistent with, advances in the science of mental health. Medical evidence will generally be required to establish severe emotional injury, and the physical-manifestations requirement serves to prevent false diagnoses based on a plaintiff's subjective and self-serving testimony regarding recognized diagnostic criteria and on generous assessments by their experts.

2. The court below unlawfully instructed the jury not to consider non-railroad causes of respondents' asbestos-related injuries, and permitted recovery even though railroad exposure was concededly a "minimal" factor in certain respondents' injuries. The text of FELA expressly limits railroad liability to injury attributable to railroad employment, and does not make a railroad the lifetime insurer of a former employee's occupational risks. Moreover, contrary to the broad rule of joint and several liability imposed by the court below, the dominant common-law rule at the time of FELA's enactment was several liability with injuries apportioned among causes on any reasonable basis; indeed, plaintiffs could not recover if they could not apportion injury among successive causes. The common law accordingly developed rules to liberalize recovery, allowing any reasonable factor to

serve as a basis for apportionment, and those rules govern today. There is no question that asbestos-related diseases, which are dose-related, can be apportioned over different occupational exposures based on factors such as duration and intensity of exposure, which are consistent with the standards applied to toxic torts under the historical and evolving common law. The federal common law, too, has embraced apportionment by causation. Moreover, the majority of States have now expressly rejected the broad theory of joint and several liability that the court below adopted and that held sway for part of the past century, developing rules of apportionment even for indivisible injuries. Accordingly, this Court should adopt the rule that injuries and damages must be apportioned by causation whenever reasonably possible, in accord with the common-law tradition; and by principles of comparative responsibility when a defendant is a legal cause of all or part of an injury that is indivisible by causation.

ARGUMENT

I. RESPONDENTS CANNOT RECOVER FEAR-OF-CANCER DAMAGES.

Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages to any person suffering injury while . . . employed" by the carrier if the "injury" results in whole or in part from carrier "negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of negligence and injury are determined by the common law "as established and applied in the federal courts." *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). In *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), this Court held that the common-law tort of negligent infliction of emotional distress is actionable under Section 1 of FELA. See *id.* at 550. Because the statute is silent on recovery for such claims, common-law restrictions play a "vital role" in determining whether, or when, an employee can recover, *id.* at 544, 551;

FELA does not make employers "insurers of the emotional well being and mental health of their employees," *id.* at 554.

The common law long forbade recovery for emotional distress, *S. Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916), out of concern that courts would be flooded with trivial or invalid claims and defendants would face infinite and unpredictable liability for remote consequences of their acts. W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) ("*Prosser on Torts* (5th ed.)"); *Gottshall*, 512 U.S. at 545-46. One branch of the law developed to permit recovery for certain mental harms from intentional wrongs. See R. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 485-86 (1982). For mere negligence, however, courts only granted damages for emotional distress caused by physical impact, what is now known as "pain and suffering," *id.* at 486: "'sensations stemming directly from a physical injury or condition.'" *Gottshall*, 512 U.S. at 544 (quoting Pearson, *supra*, at 485 n.45); see, *e.g.*, *Morse* v. *Auburn & Syracuse Ry.*, 10 Barb. 621 (N.Y. Gen. Term 1851).

Courts then gradually recognized "fright" (fear of immediate physical injury to oneself, see *Gottshall*, 512 U.S. at 556) as a distinct compensable harm, but only when it was concurrent with a physical impact. See *Mitchell* v. *Rochester Ry.*, 45 N.E. 354, 354 (N.Y. 1896); Pearson, *supra*, at 487 & n.62; see also *Gottshall*, 512 U.S. at 546-47 & n.6. A physical impact thus came to be required as a liability rule in actions for fright, rather than simply a factual predicate for recovery for pain and suffering. See Pearson, *supra*, at 487.

In time, most courts found the physical-impact rule to be highly arbitrary, realizing that "'a near miss may be as frightening as a direct hit.'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *supra*, at 488). Those courts began to allow recovery for emotional distress by "plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct,

or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (emphasis added). These disjunctives therefore became two alternative prongs of a single liability rule—the "zone-of-danger" test, which this Court in *Gottshall* adopted as the appropriate standard for FELA, eschewing a broader "bystander" standard. *Id.* at 554-57. In *Buckley* v. *Metro-North Commuter Railroad*, 521 U.S. 424, 429 (1997), this Court applied the first alternative prong of the zone-of-danger test, and held that mere asbestos exposure does not constitute a "physical impact" that could potentially lead to recovery for fear of future disease. *Id.* at 432.

A. Cancer Fears Are Not Compensable As Pain-And-Suffering From Asbestosis.

As an initial matter, the court below turned a blind eye to this Court's FELA jurisprudence and long-settled common-law distinctions in allowing recovery for negligent infliction of emotional distress as traditional "pain and suffering." The *Gottshall* Court could not have been clearer in declaring that "[t]he injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury *apart from* the tort law concepts of pain and suffering." 512 U.S. at 544 (citation omitted) (emphasis added).

> Although pain and suffering technically are mental harms, these terms traditionally have been used to describe sensations stemming directly from a physical injury or condition. The injury we deal with here is mental or emotional harm (such as fright or *anxiety*) that is caused by the negligence of another and that is *not directly* brought about by a physical injury . . . .

Id. (internal quotation marks and citations omitted) (emphasis added); *Hargis* v. *Knoxville Power Co.*, 94 S.E. 702, 703 (N.C. 1917) (pain and suffering damages are for "immediate and necessary consequences" of the harm).

Asbestosis and cancer are separate diseases, *supra* at 3, and although asbestosis and fear of cancer may arise from the

same prior asbestos exposure, fear of cancer is not a "sensation[] stemming directly" from the physical condition of asbestosis. *Gottshall*, 512 U.S. at 554. Thus, the court below only could have awarded damages for fear of cancer (if at all) as stand-alone negligently inflicted emotional distress, which is the framework in which *Buckley* addressed fear-of-cancer claims. 521 U.S. at 428-29; *accord Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805, 807-08 (Cal. 1993) (pain-and-suffering damages are "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to* the injury"; distinguishing nonparasitic damages for emotional distress from asbestos exposure recoverable under a negligent-infliction claim). This instructional error alone requires reversal of the entire judgment. *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919). Regardless, the common-law restrictions on recovery for emotional injury that are consonant with the overarching purposes of FELA must be observed. See *Gottshall*, 512 U.S. at 557; *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1348 (11th Cir. 2002); *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

B. The Court Should Adhere To The Common-Law Rule Requiring Physical Manifestations Of Severe Emotional Injury From Trauma.

In adopting the zone-of-danger test in *Gottshall*, this Court emphasized that the common law dealt with the "specter of unlimited and unpredictable liability," *Gottshall*, 512 U.S. at 557, not only by "plac[ing] substantial limitations on the class of plaintiffs that may recover" for emotional distress, but also "on the injuries that may be compensable," *id.* at 546.

"[S]evere emotional injury . . . has generally been required to establish liability for purely emotional injury." *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 566 n.13 (1987); see *id.* at 568-69 & nn.18 & 19. For intentional infliction of emotional distress, recovery is permitted only if (1) the defendant's intentional conduct is "extreme and outrageous," *Restatement (Second) of Torts* § 46(1) & cmt. d

(1977) ("*Restatement (Second)*"), and (2) the emotional injury is "severe." *Id.* § 46(1). Severity is an objective standard: "the law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.* cmt. j. Such emotional injury is normally "accompanied or followed by shock, illness, or other bodily harm," though it is not an essential element of the tort in most States. *Id.* cmt. k; see also *id.* §§ 306, 312, 313.

The common law's reluctance to compensate emotional distress "has of course been more pronounced where the defendant's conduct is merely negligent." *Prosser on Torts* § 54, at 360 (5th ed.). As with intentional torts, "most courts hold that the plaintiff can recover only if a normally constituted person would suffer, and the plaintiff in fact suffered *severe* distress," and "[i]n addition" require plaintiffs to present objective evidence of physical manifestations of severe emotional injury, thus retaining a requirement that the courts had gradually found unnecessary for the intentional tort. D. Dobbs, *The Law of Torts* § 308, at 836-37 (2000) (emphasis added) (footnote omitted); *Prosser on Torts* § 12, at 57 (5th ed.).[8] The injuries that are cognizable must result from immediate trauma: *i.e.*, "the emotional disturbance must be the immediate result of the actor's negligent conduct," whether the fear is one of immediate harm or continued peril. *Restatement (Second)* § 436 cmt. c. Moreover, the physical-manifestations requirement is one of actual bodily harm or injury caused by the emotional disturbance. *Id.* § 436 & cmt. b. Mere transitory physical phenomena do not suffice for recovery; there must be "substantial bodily harm" as a result of the emotional injury, such as "long continued nausea" or "repeated hysterical attacks." *Id.* § 436A cmt. c.; see *Falzone* v. *Busch*, 214 A.2d 12, 17 (N.J. 1965) (no recovery "where

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[8] *See* 1 J. Nates et al., *Damages in Tort Actions* § 5.03[2][e], at 5-87 (2002) ("*Damages in Tort Actions*"); *Bethards* v. *Shivvers, Inc.*, 355 N.W.2d 39, 44 (Iowa 1984) (distress must be so severe that a reasonable person could not be expected to endure it).

fright does not cause *substantial* bodily injury or sickness"); *Muchow* v. *Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1984). Summarizing the judicial rationale for the limitation on compensable injury, the Restatement explains that (1) emotional harms not manifest in physical injury are generally not serious enough to burden the courts; (2) without such a requirement, the "emotional disturbance may be too easily feigned, depending, as it must, [on] subjective testimony"; and (3) negligent actors are not so culpable as to "be required to make good a purely mental disturbance." *Restatement (Second)* § 436A cmt. b; see *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985) (rule necessary to "place some boundaries on the indefinable and unmeasurable psychic claims"); *Prosser on Torts* § 54, at 361 (5th ed.).

The physical-manifestations rule of the Second Restatement remains the prevailing rule in zone-of-danger and relative-bystander jurisdictions.[9] Most jurisdictions that do not

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[9] *See Hancock* v. *Northcutt*, 808 P.2d 251, 257-58 (Alaska 1991); *Villareal* v. *State*, 774 P.2d 213, 221 (Ariz. 1989); *Towns* v. *Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978) (en banc); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Champion*, 478 So. 2d at 20; *Czaplicki* v. *Gooding Joint Sch. Dist.*, 775 P.2d 640 (Idaho 1989); *Barnhill* v. *Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *Anderson* v. *Sheffler*, 752 P.2d 667, 669 (Kan. 1988); *Beynon* v. *Montgomery Cablevision L.P.*, 718 A.2d 1161, 1163 (Md. 1998); *Sullivan* v. *Boston Gas Co.*, 605 N.E.2d 805, 810 (Mass. 1993); *Payton* v. *Abbott Labs.*, 437 N.E.2d 171, 181 (Mass. 1982); *Daley* v. *LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *Leaon* v. *Wash. County*, 397 N.W.2d 867, 875 (Minn. 1986); *Olivero* v. *Lowe*, 995 P.2d 1023, 1026 (Nev. 2000); *Thorpe* v. *State*, 575 A.2d 351, 353 (N.H. 1990); *Falzone*, 214 A.2d at 17 (no recovery "where fright does not cause *substantial* bodily injury or sickness"); *Portee* v. *Jaffee*, 417 A.2d 521, 527-28 (N.J. 1980) (requiring "severe emotional distress" but not addressing *Falzone* requirement); *Muchow*, 435 N.W.2d at 922; *Ellington* v. *Coca Cola Bottling Co. of Tulsa, Inc.*, 717 P.2d 109, 111 (Okla. 1986) ; *Houston* v. *Texaco, Inc.*, 538 A.2d 502, 505 (Pa. Super. Ct. 1988); *Swerdlick* v. *Koch*, 721 A.2d 849, 864 (R.I. 1998); *Kinard* v. *Augusta Sash & Door Co.*, 336 S.E.2d 465 (S.C. 1985); *Maryott* v. *First Nat'l Bank*, 624 N.W.2d 96 (S.D. 2001);

strictly require physical manifestations require some form of objective corroborating (usually medical) evidence.[10] Even among the remainder, almost no jurisdiction questions the requirement of "severe" emotional injury.[11]

Harnicher v. *Univ. of Utah Med. Ctr.*, 962 P.2d 67, 70-71 (Utah 1998); *Myseros* v. *Sissler*, 387 S.E.2d 463 (Va. 1990).

[10] *See Bass* v. *Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc); *Schleich* v. *Archbishop Bergan Mercy Hosp.*, 491 N.W.2d 307, 310-11 (Neb. 1992); *Prato* v. *Vigliotta*, 677 N.Y.S.2d 386, 388 (N.Y. App. Div. 1998) (cases involving exposure to toxic substances); *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990); *Camper* v. *Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Brueckner* v. *Norwich Univ.*, 730 A.2d 1086, 1092 (Vt. 1999); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998) (en banc); *Courtney* v. *Courtney*, 437 S.E.2d 436, 440 (W. Va. 1993); *see also Taylor* v. *Baptist Med. Ctr., Inc.*, 400 So.2d 369, 374 (Ala. 1981); *Burgess* v. *Superior Court*, 831 P.2d 1197, 1205 (Cal. 1992); *Jones* v. *Howard Univ., Inc.*, 589 A.2d 419, 424 (D.C. 1991); *Leong* v. *Takasaki*, 520 P.2d 758, 767 (Haw. 1974); *Corgan* v. *Muehling*, 574 N.E. 2d 602, 609 (Ill. 1991); *Bovson* v. *Sanperi*, 461 N.E. 2d 843, 849 (N.Y. 1984); *Paugh* v. *Hanks*, 451 N.E.2d 759, 767 (Ohio 1983); *Adams* v. *U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (Miss. 1999); *cf.* La. Civ. Code Ann. art. 2315.6(B).

[11] Dobbs, *supra*, § 308, at 836. *But see Gates* v. *Richardson*, 719 P.2d 193, 200 (Wyo. 1986). Regarding corroboration, certain jurisdictions appear to have no requirement, *see Folz* v. *State*, 797 P.2d 246, 260 (N.M. 1990); *Gates*, 719 P.2d at 200, and in others it is unclear, *Bowen* v. *Lumbermans Mut. Cas. Co.*, 517 N.W.2d 432, 442-43 (Wis. 1994) ("given the present state of medical science, emotional distress can be established by means other than proof of physical manifestation"; adopting *Restatement (Second)* § 46 severity test); *Gammon* v. *Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1284 (Me. 1987) (relying on "state of modern medical science"); *Sacco* v. *High Country Indep. Press*, 896 P.2d 411, 426 (Mont. 1995) (same); *Montinieri* v. *S. New Eng. Tel. Co.*, 398 A.2d 1180, 1183 (Conn. 1978); *Boyles* v. *Kerr*, 855 S.W.2d 593, 598 (Tex. 1993).

1. The Fundamental Requirement That A Plaintiff Demonstrate Severe Emotional Injury From Trauma Precludes Recovery For Fear Of Cancer As A Matter Of Law.

In *Gottshall* and *Buckley*, this Court addressed the first of the common-law limitations (on the class of eligible plaintiffs) on negligent-infliction claims, but it has not directly addressed the second major common-law restriction--on the types of emotional injuries that are compensable.[12] This Court should now rule that negligent-

[12] *Jones*, 287 F.3d at 1346-47. Both *Gottshall* and *Buckley* indicate, however, that the purpose of the negligent-infliction tort is to compensate severe injury. For example, when the *Gottshall* Court first recognized an emotional-distress claim under FELA, it did so in part based on the express rationale that "'severe emotional injuries can be just as debilitating as physical injuries.'" 512 U.S. at 550; *see id.* at 563, 566-67 (Ginsburg, J., dissenting) (describing plaintiffs' emotional distress as "unquestionably genuine and severe"). In *Buckley*, the Court noted that FELA's purposes militate in favor of recovery for "a serious and negligently caused emotional harm." 521 U.S. at 438; *see id.* at 435 (mere contacts with carcinogens should not lead to recovery because "[t]hey may occur without causing *serious* emotional distress") (emphasis added).

Nonetheless, neither case addressed the common-law physical-manifestations requirement. There was no cause to do so in *Gottshall* because the plaintiffs there indisputably had suffered severe and physically manifest emotional injuries corroborated by medical testimony. 512 U.S. at 536-39. In adopting the zone-of-danger test, the Court rejected the claim that "testing for the 'genuineness' of an injury *alone* can[] appreciably diminish the possibility of infinite liability," *id.* at 552, but it did not disturb the common-law rules requiring both severe emotional distress and corroborating physical manifestations. To the contrary, the Court observed that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury." *Id.* at 549 n.11. In *Buckley*, the Court did not address the common-law restriction on compensable injury because it found that the plaintiffs there did not satisfy the zone-of-danger test. *See* 521 U.S. at 430. Notably, however, the Justices who found that test satisfied nonetheless concurred in the dismissal as a matter of law because "Buckley did not present

infliction claims may only be brought if the plaintiff proves severe emotional injury from immediate trauma that is corroborated by physical manifestations. Here, respondents presented no evidence of physical manifestations of emotional injury, but more fundamentally, the restriction on recovery to cases of reasonably suffered severe emotional injury from immediate trauma precludes any recovery for fear of cancer.[13]

To allow claims for emotional distress based on after-acquired knowledge of an incremental risk of future cancer would be an unwarranted expansion of the narrow tort recognized in *Gottshall*. *Buckley*, 521 U.S. at 430. Recovery for negligently inflicted emotional distress evolved at common law, as an exception to the general prohibition on recovery, in cases involving actual or threatened "*immediate traumatic* harm." *Id.* at 430-31 (emphasis added) (citing cases).[14] "Subsequent brooding over the actor's misconduct or the danger in which it had put the [plaintiff] is not enough . . . ." *Restatement (Second)* § 436 cmt. c; see *id.* § 436(2). Even courts applying the more liberal bystander rule today refuse to expand this tort to cover knowledge-

objective evidence of severe emotional distress." *Id.* at 445 (Ginsburg, J., concurring in part and dissenting in part).

[13] *Buckley* only decided that an exposed employee who lacked any symptoms of asbestos-related disease had no cause of action for emotional distress. *See* 521 U.S. at 426-27. It did not decide that asbestosis, or any specific asbestos-related disease, would in fact qualify a plaintiff for recovery under the zone-of-danger test, because those facts were not presented. See American Ins. Association ("AIA") Br. 7-8; Association of American Railroads ("AAR") Br. 3-4.

[14] *See also Restatement (Second)* § 436 cmt. c ("the emotional disturbance must be the immediate result of the actor's negligent conduct"); J. Henderson & A. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 S.C. L. Rev. (forthcoming 2002) (Lodged Copy at L23) (negligent-infliction tort "is quite limited in scope" and allows "recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature").

based claims, even of information far more devastating than incremental epidemiological risk of future disease.[15]

Moreover, if knowledge-based fears were actionable, the law would not allow recovery by one who simply was misinformed. A plaintiff claiming knowledge-based fears would have some duty to understand his incremental risk based on current epidemiology[16]—an unworkable rule given its incomprehensibility to the layperson, the uncertainty and flux in scientific understanding of cancer risks from asbestos, and the intrinsic complexity of translating any statistical data into personal risk. See *Buckley*, 521 U.S. at 435 (recognizing data is "controversial and uncertain" and the problem that "those exposed" are not "experts in statistics").

The epidemiological data on asbestos and lung cancer is uncertain for various reasons, but principally because of the varying results across different occupational cohorts and the difficulties in disaggregating the effects of smoking, the leading cause of lung cancer. See M. Goodman et al., *Cancer*

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[15] *Thing* v. *La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989) (requiring plaintiff to be present for the accident and "then aware that it is causing injury," in contrast to later "learning about the injurious consequences"); *Frame* v. *Kothari*, 560 A.2d 675, 678 (N.J. 1989) (injury witnessed by bystander "must be one that is susceptible to immediate sensory perception, and the plaintiff must witness the victim when the injury is inflicted or immediately thereafter"); *see also* La. Civ. Code Ann. art. 2315.6; *Asaro* v. *Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990); *Culbert* v. *Sampson's Supermarkets, Inc.*, 444 A.2d 433, 438 (Me. 1982); *Hair* v. *County of Monterey*, 45 Cal. App. 3d 538, 543-44 (1975) (denying parent recovery where child became blind, brain damaged, and quadriplegic following negligent oral surgery; damages "flow[ing] from knowledge of unobserved tort" not compensable); *Jansen* v. *Children's Hosp. Med. Ctr.*, 31 Cal. App. 3d 22, 24 (1973) (distress from learning of the accident from others after its occurrence insufficient).

[16] *See In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1570 (D. Haw. 1990) ("A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer.").

in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis, 10 Cancer Causes & Control 453, 461 (1999); Kevin Brown, Letter, *The Quantitative Risks of Mesothelioma and Lung Cancer In Relation To Asbestos Exposure*, 45 Ann. Occ. Hyg. 327, 328 (2001).

The lifetime probability of a nonsmoker developing lung cancer is estimated to be around one percent, but smokers, although their risks vary with the intensity and duration of their smoking, on average have a 23-fold increase in lung cancer risk over nonsmokers, and ex-smokers a nine-fold increase.[17] Thus, some smokers have a lifetime lung-cancer risk of about 20%. Studies of asbestos risk confront the problem that 95% of asbestos-exposed workers who developed lung cancer were smokers. See F.D.K. Liddell, *The Interaction of Asbestos and Smoking in Lung Cancer*, 45 Ann. Occ. Hyg. 341, 350 tbl.3 (2001) (compiling data from studies covering nearly five decades). Certain early studies of very heavily exposed, long-term insulation workers suggested a five-fold asbestos risk that was multiplicative of smoking risk. See, *e.g.*, E.C. Hammond et al., *Asbestos Exposure, Cigarette Smoking and Death Rates*, 330 Ann. N.Y. Acad. Sci., 473, 487 tbl.8 (1979). Those results have not been supported for other kinds of workers in more recent comprehensive studies covering nearly 50 cohorts of workers in various occupations—all involving prolonged exposures far greater than the sporadic exposures to which respondents testified. Studies of nearly 40 cohorts showed less than a two-fold increase in lung cancer risk, with an average increase of only a factor of 1.65, and *no* excess risk among

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[17] *See* Nat'l Cancer Inst. ("NCI"), *Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control* xi tbl.1 (Smoking & Tobacco Control Monograph No. 8, 1997); Surgeon General, U.S. Dep't of Health & Human Servs., *Reducing the Health Consequences of Smoking: 25 Years of Progress*, 150 tbl.6 (1989).

asbestos-exposed railroad workers.[18] Moreover, risks vary significantly with fiber type and cessation of exposure (suggesting many living workers face risks much less than their forebears).[19] Moreover, recent peer-reviewed studies merging data from larger cohorts of exposed workers indicate that the combined effect of asbestos exposure and smoking may be less than multiplicative, and perhaps closer to additive.[20] FELA should not grant juries free rein to make inherently subjective awards of damages for emotional distress on the basis of the manipulable diagnoses of asbestosis, and the claimed emotional reaction of the plaintiff

[18] The standard mortality ratio across all studies (meta-SMR) was 165 (expected mortality=100); the SMR was greater than 200 in only 10 of the 47 cohorts studied. R.W. Morgan, *Attitudes About Asbestos and Lung Cancer*, 22 Am. J. Indus. Med. 437, 438 tbl.1 (1992); Goodman et al., *supra*, at 458 tbl.2, 459 tbl.3 (update calculating meta-SMR of 163, and tabulating SMRs of railway repair workers as under 100); G. Howe et al., *Cancer Mortality (1965-77) in Relation to Diesel Fume and Coal Exposure in a Cohort of Retired Railway Workers*, 70 JNCI 1015, 1017 tbl.3 (1983).

[19] There is accumulating evidence that certain asbestos fibers are less hazardous and less likely to induce lung cancer and mesothelioma than others. *See* Morgan & Seaton, *supra*, at 346-47 (citing J.M. Hughes, *Epidemiology of Lung Cancer in Relation to Asbestos Exposure, in Mineral Fibres and Health* 136 (F.D.K. Liddell & K. Miller eds., 1991)). *See id.* at 347 (noting that "[for] workers exposed primarily to chrysotile [fibers], regardless of the type of occupational exposure, the lung cancer risk was 25% or less above background rates"; mesothelioma is associated primarily with crocidolite fibers). Moreover, evidence suggests the risk of lung cancer is increased only in those with moderate to severe asbestosis. *Id.* at 148.

[20] *See* F.D.K. Liddell & B.G. Armstrong, *The Combination of Effects on Lung Cancer of Cigarette Smoking and Exposure in Quebec Chrysotile Miners and Millers*, 46 Ann. Occ. Hyg. 5 (2002). *See generally* T. Erren et al., *Synergy Between Asbestos and Smoking on Lung Cancer Risks*, 10 Epidemiology 405 (1999). If risks are additive, a 3% risk from asbestos and a 20% risk from smoking yield a 23% combined risk of lung cancer, rather than the 60% risk of a multiplicative model.

to whatever risks of cancer are reported to him (often by a lawyer in search of a client).

In any event, as a matter of law any injury generated by reasonable knowledge of asbestos-related risks could not meet the objective severity test of the common law. A nonsmoker, like Respondent Shirley, has a total lung cancer risk of at most a few percent. JA 214. Smokers have higher absolute risk, with the weight of evidence suggesting a small additional increase from asbestos, with only long-term, exceptionally heavy asbestos exposure (not the situation for respondents) increasing risk more. Mesothelioma risks, which do not vary with smoking but do vary with fiber type, are also small. Among some heavily-exposed occupational groups (again not the case here), mesothelioma has accounted for up to ten percent of deaths, but in the large majority of studies of asbestos workers less than two percent, and usually less than one percent, of deaths have been due to this cancer. See Goodman et al., *supra*, at 456-57 tbl.I. Moreover, these disease-specific risks must be put into further perspective. The average American male has a 44% lifetime chance of contracting—and a 24% chance of dying from—some form of cancer (not including skin cancer)[21]; see also *Buckley*, 521 U.S. at 435. Smokers, because smoking causes seven other cancers, debilitating and fatal respiratory diseases, and cardiovascular and other diseases, have a 50% chance of dying from a *smoking*-caused disease. See NCI, *supra*, at xi tbl.1. Against this background, the small incremental risk from asbestos exposure simply is not enough reasonably to cause a normal person to suffer immediate emotional distress of the severe character long required by the common law.

Cancer is a frightful disease, but jury awards for fear of cancer that are based solely on perceived statistical risks

[21] *See* L.A.G. Ries et al., NCI, *SEER Cancer Statistics Review, 1973-1999*, at I-15, I-16 (2002), *available at* http://seer.cancer.gov/csr/1973_1999.

augur liability without rational limit. Asbestosis and cancer are separate diseases that are separately actionable, and the rule should be that a plaintiff who can prove work-related cancer should recover for not only that injury but all related mental anguish as pain and suffering. See AIA Br. 5-7; AAR Br. 5-8; *Simmons* v. *Pacor*, 674 A.2d 232, 239 (Pa. 1996). The recovery respondents seek has no viable basis in law.

2. Permitting The Jury To Award Damages For Emotional Distress Uncorroborated By Objective Physical Manifestations Was Error.

This Court should adhere to the well-founded common-law rule requiring corroborating physical manifestations of negligently inflicted emotional distress. The Court suggested in *Buell* a significant distinction between FELA claims for "pure emotional injury" and those involving "physical symptoms in addition to . . . severe psychological illness." 480 U.S. at 570 n.22. And the *Gottshall* Court noted that many zone-of-danger and bystander jurisdictions additionally require physical manifestation of emotional distress, 512 U.S. at 549 n.11; *id.* at 564 (Ginsburg, J., dissenting), as does the Second Restatement.

The only court of appeals to address this issue under FELA recently held, after thorough review, that plaintiffs are "required to make a showing of objective manifestations of their emotional distress to recover for that distress under the FELA." *Jones*, 287 F.3d at 1345; see *id.* at 1349 (noting *Gottshall* Court's concern particularly with "'unpredictable and nearly infinite liability'"); see also *Martinez* v. *Bally's La., Inc.*, 244 F.3d 474, 477-78 (5th Cir. 2001) (Jones Act); *Adkins* v. *Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir. 1987) (same).

As noted above, the physical-manifestations requirement remains the prevailing rule.[22] The Second Restatement is in accord. *Restatement (Second)* § 436A & cmt. a, *id.* cmt. c (requiring "substantial bodily harm"); see *Gottshall*, 512 U.S. at 564 (Ginsburg, J., dissenting); *Jones*, 287 F.3d at 1347. And the clear weight of authority among the federal courts in FELA, Jones Act, and general maritime cases requires a showing of objective physical manifestations.[23]

A review of the common law at the time of FELA's enactment confirms this rule.[24] See *Gottshall*, 512 U.S. at 554-55 (analyzing common law of 1908 in determining FELA

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[22] *See supra* note 9; *Jones*, 287 F.3d at 1348-49 (citing cases); *Prosser on Torts* § 54, at 364 & n.55 (5th ed.) (citing cases) ("the great majority of courts" require "that the mental distress be certified by some physical injury, illness or other objective physical manifestation"); D. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 796-98 & n.91, 808 & n.146 (1988).

[23] *See, e.g.*, *Williams* v. *Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995); *Nelsen* v. *Research Corp.*, 805 F. Supp. 837, 849 (D. Haw. 1992); *Puthe* v. *Exxon Shipping Co.*, 802 F. Supp. 819, 828 (E.D.N.Y. 1992), *aff'd*, 2 F.3d 480 (2d Cir. 1993); *Masiello* v. *Metro-North Commuter R.R.*, 748 F. Supp. 199, 205 (S.D.N.Y. 1990); *Elliott* v. *Norfolk & W. Ry.*, 722 F. Supp. 1376, 1377-78 (S.D.W. Va. 1989), *aff'd on other grounds*, 910 F.2d 1224 (4th Cir. 1990); *Teague* v. *Nat'l R.R. Passenger Corp.*, 708 F. Supp. 1344, 1350 (D. Mass. 1989); *Halko* v. *N.J. Transit Rail Operations, Inc.*, 677 F. Supp. 135, 139 (S.D.N.Y. 1987).

[24] All the early cases cited in *Gottshall* to support recognition of a negligent-infliction claim, *see* 512 U.S. at 547 n.8, upheld the physical-manifestations requirement. *See Gulf, Colo. & Santa Fe Ry.* v. *Hayter*, 54 S.W. 944, 945 (Tex. 1900); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908, 910 (S.C. 1898); *Kimberly* v. *Howland*, 55 S.E. 778, 780-81 (N.C. 1906), *overruled on other grounds*, *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); *Pankopf* v. *Hunkley*, 123 N.W. 625, 626-27 (Wis. 1909); *Purcell* v. *St. Paul City Ry.*, 50 N.W. 1034, 1035 (Minn. 1892); *Simone* v. *R.I. Co.*, 66 A. 202, 203-04 (R.I. 1907); *Stewart* v. *Ark. S. R.R.*, 36 So. 676, 677 (La. 1904); *Watson* v. *Dilts*, 89 N.W. 1068, 1068-69 (Iowa 1902).

rule). Most zone-of-danger courts at that time allowed recovery only for the physical injuries plaintiffs suffered as a consequence of their emotional distress, not for the intermediate emotional distress itself. See, *e.g.*, *Watson* v. *Dilts*, 89 N.W. 1068, 1069-70 (Iowa 1902) (allowing recovery for "physical injuries resulting from . . . fright"); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908 (S.C. 1895); *Pankopf* v. *Hunkley*, 123 N.W. 625, 627 (Wis. 1909); *Simone* v. *R.I. Co.*, 66 A. 202, 204-05, 209 (R.I. 1907). Courts gradually liberalized as they came to grips with the potential inconsistency in allowing recovery for physical injuries caused by fright or anxiety, but not the fright or anxiety itself. See *Chiuchiolo* v. *New Eng. Wholesale Tailors*, 150 A. 540, 543 (N.H. 1930). Even then "[a]ll the courts agree[d] that mere fright, unaccompanied or followed by physical injury, [could not] be considered as an element of damage." *Kimberly* v. *Howland*, 55 S.E. 778, 780 (N.C. 1906), *overruled on other grounds*, *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); see C. McCormick, *Handbook on the Law of Damages* § 89(b) (1935). It would be curious indeed to ascribe to Congress an intent in 1908 not to require physical manifestations, when most of the courts that allowed recovery at all limited recovery strictly to the resulting physical harms themselves. Thus, allowing recovery in 1908 for intermediate fright if it caused actual physical injury was the then-liberal rule. Cf. *Gottshall*, 512 U.S. at 555 (adopting zone-of-danger test in part due to status as liberal rule in 1908). Because the physical-manifestations requirement was the clear majority rule both at the time of FELA's enactment and today, it should apply universally to all FELA claims.

Finally, the same common-law policy reasons that weighed against the broadest eligibility test in *Gottshall*, and against an expansive definition of "physical impact" in *Buckley*, weigh as heavily against abandonment of the physical-manifestations rule here. See *Buckley*, 521 U.S. at 436.

First, the physical-manifestations requirement helps courts avoid the "'fantastic realm of infinite liability'" for emotional injury. *Gottshall*, 512 U.S. at 563 (Ginsburg, J., dissenting). There is no effective constraint on juries in determining the amount of damages to award for mental distress. The Court in *Gottshall* considered the common-law "fear of unlimited liability[] to be well founded." *Id.* at 557; see *id.* at 546 (deeming possibility "very real"). "Every injury has ramifying consequences, like the ripplings of the waters, without end," and thus "[t]he problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Id.* at 553 (internal quotation marks omitted). Although the zone-of-danger test provides some measure of security, the common law always has mitigated this policy concern by "plac[ing] substantial limitations on the class of plaintiffs . . . *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). Accordingly, the categorical physical-manifestations requirement appreciably diminishes the possibility that compensation for emotional distress would cost society unreasonably more than it would benefit. See *Buckley*, 521 U.S. at 438; *Jones*, 287 F.3d at 1349.

Second, the physical-manifestations requirement aids judges and juries in making what are "'highly subjective determinations'" in weeding out invalid and trivial claims. The *Buckley* Court considered the facts of that case to illustrate the "serious" "evaluation" problem presented by these claims. 521 U.S. at 433-35. The Second Circuit in *Buckley* found objective confirmation of severe emotional distress in evidence of complaints to supervisors and investigative bodies. See *id.* at 433. This Court, however, considered such evidence "only indirectly related to the question at issue, the *existence and seriousness* of Buckley's claimed emotional distress." *Id.* at 433-34 (emphasis added); see *id.* at 445 (Ginsburg, J., concurring in part and dissenting in part). Evidence of physical manifestations, by contrast, *is* directly related to that question. *Prosser on Torts* § 54, at

360-61 (5th ed.); see *Gottshall*, 512 U.S. at 571 (Ginsburg, J., dissenting) (suggesting "'objective medical proof'" as a possible filter). Moreover, adherence to the physical-manifestations requirement is consistent with *Buckley*'s preference for rules reflecting the courts' general policy of discouraging standardless case-by-case inquiry. See 521 U.S. at 436.

Third, the physical-manifestations requirement helps to stem the ever rising tide of trivial or comparatively less important emotional-distress claims. See *Jones*, 287 F.3d at 1349. The Court in *Buckley* asked, "[i]n a world of limited resources, would a rule permitting immediate large-scale recoveries for wide-spread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" 521 U.S. at 435-46. The collective financial risks of railroads from asbestos (and other occupational exposure) liability are breathtaking if the patterns of multimillion-dollar judgments for healthy plaintiffs continues unabated. See *id.* at 438 (courts construing FELA "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"); *supra* at 5-6. As this case vividly illustrates, allowing otherwise unrestricted recovery by those who arguably develop asbestosis (or another benign disease), provides no protection for railroads (nor future claimants) from trivial claims. Coalition for Asbestos Justice Br. 3-4; Chamber of Commerce Br. 4-10.

The Eleventh Circuit aptly stated that although "the objective manifestation requirement has been subject to criticism and . . . has been rejected by some courts,"[25] "the

[25] The physical-manifestations requirement is not inconsistent with advances in medical science on mental health. *Restatement (Second)* 436A cmt. c. A physical-manifestations requirement does not obviate the need for medical testimony; indeed, it is difficult to conceive how any plaintiff could recover for objectively "severe" emotional injury without demonstrating a recognized mental illness or disorder. *See, e.g., Bass*, 646 S.W.2d at 772-73 (plaintiff must show that the disease "is severe enough to be medically significant"). Moreover, many (if not all) psychiatric disorders are manifest by physical symptoms. *See* N. Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestations Requirement in N.I.E.D. Cases*, 26 Am. J. L. & Med. 402, 420-22 (2000).

large number of jurisdictions that require some type of objective or verifiable evidence of plaintiff's emotional injury convinces us that the requirement continues to be an appropriate limitation on the recovery for such injury." *Jones*, 287 F.3d at 1349. In short, the physical-manifestations requirement best reconciles the remedial purposes of FELA and the substantial concerns of the common law regarding unlimited and unpredictable recovery for emotional harm.

Respondents made no showing of substantial bodily harm or illness arising from their claimed emotional distress. See *supra*, at 8-9. Indeed, plaintiffs put on no objective evidence (much less medical evidence) of their alleged distress, resting instead on subjective assertions made in their own self-serving testimony. Moreover, as a matter of law there is no evidence of severe emotional injury suffered by any respondent, and thus their claims would fail under any standard this Court may adopt. Accordingly, this Court should vacate the judgments below.

II. FELA REQUIRES THAT DAMAGES BE APPORTIONED WHENEVER APPORTIONMENT IS REASONABLY POSSIBLE.

The court below instructed the jury that it could not apportion respondents' injuries among contributing causes, including exposures to asbestos and other occupational dusts that occurred outside railroad employment. JA 570. The result was that petitioner was held jointly and severally liable for the entirety of respondents' damages (save for the percentage attributable to their negligence) even though the railroad exposure was only one of multiple, successive causes, and was concededly a minimal cause of injury for certain respondents. This was error. The language and history of FELA

require damages to be apportioned among contributing causes so that, simply put, the railroad is only held liable for the injury that it causes. Apportionment was the common-law rule at the time of FELA's enactment; indeed, given the dominant rule of several liability, where an injury was caused by successive independent causes, as here, a defendant could not be held liable unless the plaintiff proved the defendant's causal contribution to his injury. The evolving common law (including federal law) retains the traditional strong preference of the common law for apportionment by cause on any reasonable basis. Moreover, most States have abolished pure joint and several liability when a defendant is a legal cause of all or part of an injury that is indivisible by cause, and apportion damages based on principles of comparative responsibility. Such apportionment rules should govern under FELA.

A. The Text And History Of FELA Support Apportionment.

The interpretation of FELA begins with the language and history of the statute. See *Gottshall*, 512 U.S. at 541. Section 1 provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier*." 45 U.S.C. § 51 (emphasis added). This provision makes clear that railroads are not liable for employee injuries that result from outside causes. Accordingly, if a railroad is to be held liable for occupational diseases that result from multiple causes, Section 1 requires that railroad and non-railroad causes be separated, and that the railroad be held liable for only the portion of the injury caused by its negligence. See *Urie*, 337 U.S. at 181 (statute limits compensable injury to those "suffered by any employee *while employed* by reason of the carrier's negligence") (emphasis added).[26]

[26] Indeed, the structure and common law background of FELA suggest an overall congressional purpose to apportion liability. The statute replaced contributory negligence with comparative negligence, *see* 45 U.S.C. § 53; abolished the absolute bar of the fellow servant rule, *see id.* § 51; and left in place the common law preference for several liability, *see infra* Section II.B; *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress is presumed not to abrogate the common law unless it does so expressly). Taken together, these doctrines demonstrate that Congress intended to create a statutory scheme that holds tortfeasors liable only for the harm caused by each. *See Dale* v. *Baltimore & Ohio R.R.*, 552 A.2d 1037, 1041 (Pa. 1989) ("[I]t is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused."); Coalition for Asbestos Justice Br. 25-27.

This construction of Section 1 is confirmed by FELA's history, which demonstrates that the statute was intended to hold railroads liable only for the injuries that they cause: "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy [in FELA] that shifted part of the human overhead of doing business from employees to their employers." *Gottshall*, 512 U.S. at 542 (internal quotation marks omitted). Thus, FELA supplanted the traditional common-law duty of the master to the servant, which did not extend to protection from the torts of fellow servants, "with the far more drastic duty of paying damages for injury or death *at work* due in whole or in part from the employer's negligence." *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957) (emphasis added).

Although FELA did away with the master-servant rule, it did not replace it with a workers' compensation scheme or "make the railroad the insurer for all employee injuries." *Buckley*, 521 U.S. at 429. Yet the rule adopted below would do just that, rendering railroads liable for all damages suffered by an employee, no matter how short the period of employment or how slight the railroad's contribution to the injury. The case of Respondent Butler illustrates the inequity of such a rule. Butler worked at N&W for less than three years, and testified that he was unaware of any asbestos exposure during that time, although he *might* have been exposed during one

brief three-month period. JA 250-51. In contrast, Butler later worked for 33 years as a pipefitter for other employers, and testified that he experienced "significant" asbestos exposure at those workplaces. JA 257-59; see also JA 274-75 (testimony of Freeman Ayers that he last worked for N&W in 1962, and subsequently worked in automotive maintenance with frequent direct exposure to asbestos). Even so, N&W was held liable for the entirety of Butler's damages, despite its conceded "minimal" contribution to his injury, JA 236-37, and the ready availability of a basis for apportioning damages. In designing a statute that permits an employee to recover for accidental injuries sustained at work, Congress did not intend such far-reaching liability.

Indeed, the federal courts have widely recognized the propriety of apportionment in the common circumstance of preexisting conditions. See, *e.g.*, *Varhol* v. *Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990); *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632, 632 (4th Cir. 1969); *Gustafson* v. *Burlington N. R.R.*, 561 N.W.2d 212, 219-20 (Neb. 1997); AAR Br. 21-23; *cf. Restatement (Second)* § 433A cmt. a at 435 (discussing preexisting conditions as one basis for apportionment). Even when there is no clear basis for measuring the aggravation of injury, these courts have embraced the common law rule, see *infra* at 37-38 & note 31; *id.* at 41, that apportionment need not be exact: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit rough practical apportionment." *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996).

B. FELA Incorporates The Common-Law Preference For Apportionment That Prevailed At The Time Of Its Enactment.

This interpretation of FELA's plain language is bolstered by the fact that, at the time FELA was enacted, courts regularly apportioned damages among contributing causes.

As this Court has repeatedly stated, common-law practices in 1908 are persuasive evidence of FELA's meaning. *Gottshall*, 512 U.S. at 554; *Monessen S.W. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988). And, at the time of FELA's enactment, the common-law rule was clear: "[A]cts of independent tort-feasors, each of which causes some damage, may not be combined to create a joint liability at law for damages."[27] Several liability was not only the general rule, but the overwhelming rule.[28] In contrast, joint liability was imposed

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[27] Annotation, 9 A.L.R. 939, 942 (1920); 38 *Cyclopedia of Law & Procedure* 484-85 (William Mack ed., 1911) ("*Cyc.*"); T. Cooley, *A Treatise on the Law of Torts* § 314, at 623 (John Lewis ed., 1907).

[28] *See, e.g.*, *Sloggy* v. *Dilworth*, 36 N.W. 451, 453 (Minn. 1888) ("If the damage caused is the combined result of several acting independently, recovery may be had severally in proportion to the contribution of each to the nuisance, and not otherwise."); *see also Jones* v. *Tenn. Coal, Iron & R.R.*, 80 So. 463, 465 (Ala. 1918); *Ralston* v. *United Verde Copper Co.*, 37 F.2d 180, 184 (D. Ariz. 1929), *aff'd*, 46 F.2d 1 (9th Cir. 1931); *Le Laurin* v. *Murray*, 87 S.W. 131, 133 (Ark. 1905); *Miller* v. *Highland Ditch Co.*, 25 P. 550, 551 (Cal. 1891); *Livesay* v. *First Nat'l Bank*, 86 P. 102, 104-05 (Colo. 1906); *Gulf, Colo. & Santa Fe Ry.* v. *Cities Serv. Co.*, 273 F. 946, 950-51 (D. Del. 1921); *Standard Phosphate Co.* v. *Lunn*, 63 So. 429, 432 (Fla. 1913); *Schneider* v. *City Council*, 45 S.E. 459, 460 (Ga. 1903); *Woodland* v. *Portneuf-Marsh Valley Irrigation Co.*, 146 P. 1106, 1106-07 (Idaho 1915); *Chi. & Alton R.R.* v. *Glenney*, 9 N.E. 203, 204-05 (Ill. 1886); *Louisville, New Albany & Chi. Ry.* v. *Jones*, 9 N.E. 476, 485-86 (Ind. 1886); *Anderson* v. *Halverson*, 101 N.W. 781, 781-82 (Iowa 1904); *Powers* v. *Kindt*, 13 Kan. 74 (1874), *available at* 1874 WL 690, at *1 (1874); *Polk* v. *Ill. Cent. R.R.*, 195 S.W. 129, 130-31 (Ky. 1917); *Middlesex Co.* v. *City of Lowell*, 21 N.E. 872, 873 (Mass. 1889) (Holmes, J.); *Albrecht* v. *St. Hedwig's Roman Catholic Benevolent Soc'y*, 171 N.W. 461, 462 (Mich. 1919); *King* v. *Ruth*, 101 So. 500, 500 (Miss. 1924); *Sherwood* v. *St. Louis S.W. Ry.*, 187 S.W. 260, 263 (Mo. Ct. App. 1916); *Watson* v. *Colusa-Parrot Mining & Smelting Co.*, 79 P. 14, 15 (Mont. 1905); *Brown* v. *Chi., Burlington & Quincy R.R.*, 195 F. 1007, 1011-12 (D. Neb. 1912); *McLeod* v. *Miller & Lux*, 167 P. 27, 55-56 (Nev. 1917); *State* v. *Wood*, 35 A. 654, 654 (N.J. 1896); *Wood* v. *Snider*, 79 N.E. 858, 861 (N.Y. 1907); *Long* v. *Swindell*, 77 N.C. 176, 183-85 (1877); *Boulger* v. *N. Pac. Ry.*, 171 N.W. 632, 634 (N.D. 1918); *City of Mansfield* v. *Brister*, 81 N.E. 631, 633-35 (Ohio 1907); *Pac. Livestock Co.* v. *Murray*,

only in limited circumstances—none of which is present here—such as when tortfeasors acted in concert or with unity of purpose.[29]

Courts apportioned damages in a variety of circumstances. Damages were apportioned among tortfeasors, see *supra* notes 27-28; between wrongful conduct and market forces, see *Boesch* v. *Graff*, 133 U.S. 697, 706 (1890); between tortious and natural causes, *e.g.*, *Standley* v. *Atchison, Topeka & Santa Fe Railway*, 97 S.W. 244, 246-47 (Mo. Ct. App. 1906); *Radburn* v. *Fir Tree Lumber Co.*, 145 P. 632, 644 (Wash. 1915); and even between a single tortfeasor's negligent and nonnegligent conduct, *e.g.*, *Jenkins* v. *Pennsylvania Railroad*, 51 A. 704, 706 (N.J. 1902).

Of particular relevance here, where injuries were caused by the successive torts of independent actors, a defendant could not be held liable unless apportionment was possible. The plaintiff bore the burden of proving the damage caused by each defendant. See *Restatement (Third) of Torts: Apportionment of Liability* § 26 rptr's note cmt. h, at 332-33

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76 P. 1079, 1080 (Ore. 1904); *Wiest* v. *City of Phila.*, 49 A. 891, 892 (Pa. 1901); *Cole* v. *Lippett*, 46 A. 43, 43-44 (R.I. 1900); *Bebout* v. *Pense*, 141 N.W. 515, 515 (S.D. 1913); *Swain* v. *Tenn. Copper Co.*, 78 S.W. 93, 93-99 (Tenn. 1903); *Sherman Gas & Elec. Co.* v. *Belden*, 123 S.W. 119, 121 (Tex. 1909); *Pulaski Anthracite Coal Co.* v. *Gibboney Sand-Bar Co.*, 66 S.E. 73, 74 (Va. 1909); *Ames* v. *Dorset Marble Co.*, 23 A. 857, 858 (Vt. 1892); *Johnson* v. *Irvine Lumber Co.*, 140 P. 577, 578 (Wash. 1914); *Farley* v. *Crystal Coal & Coke Co.*, 102 S.E. 265, 266-67 (W. Va. 1920); *Mitchell Realty Co.* v. *City of West Allis*, 199 N.W. 390, 394-96 (Wis. 1924); *Mau* v. *Stoner*, 87 P. 434, 440 (Wyo. 1906).

[29] *See* W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 429-30 (1937) ("*Joint Torts*"); W. Hale, *Handbook on the Law of Torts* § 55, at 122 (1896); *Swain*, 78 S.W. at 94 ("Where the tort feasors have no unity of interest, common design, or purpose or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom, and it is just that each should only be held liable so far as his acts contribute to the injury."). Certain courts also allowed joint liability for concurrent torts. *See, e.g.*, *Doeg* v. *Cook*, 58 P. 707, 708 (Cal. 1899).

(2000) ("*Restatement (Third)*"). This requirement was an application of the basic principle that a plaintiff must prove causation to demonstrate negligence; thus, the failure to do so with sufficient specificity barred recovery. See, *e.g.*, *Slater* v. *Pac. Am. Oil Co.*, 212 Cal. 648, 654-55 (1931); *Harley* v. *Merrill Brick Co.*, 48 N.W. 1000, 1001 (Iowa 1891).

In *McGannon* v. *Chicago & North Western Railway*—a case on all fours with this one—the Minnesota Supreme Court considered the claims of a plaintiff who suffered lung damage after inhaling fine sand during successive periods of railroad employment. 199 N.W. 894, 894 (Minn. 1924). The plaintiff sought to sue both employers in a single action (which, at common law, was permissible only if the defendants were jointly liable, see Prosser, *Joint Torts*, at 415 & n.19). The court held joinder to be improper because "[t]he acts were not concurrent either in point of time or in result." 199 N.W. at 895; *id.* at 894 ("Causes of action for separate torts of different persons not acting in concert or by unity of design cannot be joined."). Other courts concluded likewise, holding that successive tortfeasors are severally liable, even for a single harm.[30]

To ease the harsh results for plaintiffs that accompanied this common-law rule, courts lowered the burden of production, apportioning damages whenever apportionment was reasonably possible. As Prosser described, whenever "a logical basis [could] be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it [could] be

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[30] *See, e.g.*, *Albrecht*, 171 N.W. at 462 (holding that defendants were not jointly liable because they committed two separate, successive assaults and there was no concert of action); *Coleman Vitrified Brick Co.* v. *Smith*, 175 S.W. 860, 860 (Tex. Civ. App. 1915) (holding that owner of brick plant that causes damage to plaintiff, his family and his land is not responsible for damages, if any, caused by the prior owner of the brick plant); *Mexican Nat'l Constr. Co.* v. *Middlegge*, 13 S.W. 257, 258 (Tex. 1890); *S. Iron & Steel Co.* v. *Acton*, 62 So. 402, 403 (Ala. Ct. App. 1913).

expected that the division [would] be made." W. Prosser, *Handbook of the Law of Torts* § 47, at 328, 334-35 (1st ed. 1941) ("*Prosser on Torts* (1st ed.)"); *accord Ogden* v. *Lucas*, 48 Ill. 492, 494 (1868). Presented with "evidence which reasonably tends to show the relative proportion" of the tortfeasors' fault, *Eckman* v. *Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427, 432 (1911), courts would "permit the jury, as reasonable men, to make from the evidence the best possible estimate," *Hill* v. *Chappel Bros.*, 18 P.2d 1106, 1110 (Mont. 1932).[31]

This preference for apportionment was applied in a line of cases analogous to this one, in which pollution by multiple tortfeasors harmed a plaintiff's person or property. Courts uniformly held that a tortfeasor was liable for only the portion of the injury that it had caused, see, *e.g.*, *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920), and apportioned damages on any reasonable basis—including, notably, volumetric evidence[32]—even when

[31] *Accord Wm. Tackaberry Co.* v. *Sioux City Serv. Co.*, 132 N.W. 945, 948 (Iowa 1911); *Bowman* v. *Humphrey*, 109 N.W. 714, 716 (Iowa 1906) ("It may, sometimes, be difficult to separate and apportion the damages chargeable to the defendant, but that difficulty goes simply to the amount and not to the right of recovery."); *Chipman* v. *Palmer*, 77 N.Y. 51, 54 (1879); *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920); 38 *Cyc.* at 484-85. The ready availability of apportionment makes further sense in light of the fact that contribution between tortfeasors was unavailable at common law, and the law refused to saddle minimally culpable defendants with the entire burden of a damages award. *Miller*, 25 P. at 551.

[32] *See, e.g.*, *Ralston*, 37 F.2d at 184 (apportioning damages between two smelters, the emissions from which damaged plaintiff's crops, based on the amount of ore processed by each); *Thomas* v. *Ohio Coal Co.*, 199 Ill. App. 50, 56-57 (1916) (suggesting that damages caused by runoff from oil wells be apportioned based on the number and activity of wells owned by each defendant); *see also Woodland*, 146 P. at 1106-07; *Harley*, 48 N.W. at 1001-02; 38 *Cyc.* at 485 & n.96; *Prosser on Torts* § 47, at 333 & nn.14-17 (1st ed.). Similarly, in animal trespass cases, courts held defendants severally liable, *see* 38 *Cyc.* at 484 & n.95; *Prosser on Torts* § 47, at 332-

separate torts combined to produce a single injury. See *Symmes* v. *Prairie Pebble Phosphate Co.*, 63 So. 1, 3 (Fla. 1913) ("[t]orts that are several, separate, and independent acts when committed do not become joint by the subsequent union or intermingling of their consequences"); *Verheyen* v. *Dewey*, 146 P. 1116, 1119-20 (Idaho 1915). Congress thus enacted FELA against the backdrop of a common-law preference for apportionment, which served largely to benefit plaintiffs who would bear the burden of proving attributable injury.

C. The Evolving Common Law Likewise Expresses A Strong Preference For Apportionment.

This Court's determination of liability rules under FELA is "'informed by reference to the evolving common law.'" *Buckley*, 521 U.S. at 429, 439; *Kernan* v. *Am. Dredging Co.*, 355 U.S. 426, 432 (1958). The common law has been unwavering in its embrace of liberal rules of apportionment by causation, and a clear majority of States have gone even further in recent decades, adopting such additional methods as fault-based and pro rata apportionment.

For a period during the middle of the last century, joint and several liability was given somewhat broader rein. Reacting against common-law pleading and proof requirements, many States expanded joint and several liability (even to some consecutive torts), see, *e.g.*, *Landers* v. *E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734-35 (Tex. 1952), broadened the concept of "indivisible" harm,[33] see G. Boston, *Apportionment of Harm in Tort Law: A Proposed Restate-*

33 & nn.11-13 (1st ed.), and found numerous ways to apportion damages even in the absence of clear evidence of causation, *see, e.g.*, *Ogden*, 48 Ill. at 494 (apportioning liability based on the number of trespassing cattle owned by each defendant).

[33] The description of harms as "divisible" or "indivisible" in the Second and Third Restatements refers to whether damages are reasonably capable of division by cause, *see Restatement (Third)* § 26, whereas the term "distinct harms" refers to the nature of the injury itself, such as when a plaintiff suffers two separate wounds, *see Restatement (Second)* § 433A cmt. b.

ment, 21 U. Dayton L. Rev. 267, 290-91 (1996), and shifted the burden of proving divisibility to defendants, see *Restatement (Second)* § 433B.[34] However, that move toward joint and several liability has long since been abandoned as inequitable, because of cases like *Walt Disney World* v. *Wood*, in which Disney was held jointly and severally liable, despite the fact that it had been found only 1% culpable. 515 So. 2d 198, 198, 202 (Fla. 1987); 6 *Damages in Tort Actions* § 49.03[3], at 49-13; *Restatement (Third)* § 17 rptr's note cmt. a. Now, damages are routinely apportioned by cause, using any practical measure, as always; and, in a clear majority of States, even damages termed "indivisible" are now apportioned based upon notions of comparative responsibility.

1. The Evolving Common Law Recognizes Apportionment Based On Causation Where There Is A Reasonable Basis For Division.

Consistent with the common-law tradition at the turn of the century, modern courts apportion damages based upon causation. Under this method, damages are apportioned among contributing causes—whether innocent or tortious, natural or intentional—based on the role played by each in causing the harm. Contemporary authorities require that harms be apportioned when they are "divisible"—*i.e.*, when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement (Second)* § 433A. This well-established approach has been adopted by the Second and Third Restatements of Torts.[35]

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[34] Importantly, even during that period, apportionment was widely available under the circumstances present here. *See, e.g., Restatement (Second)* § 433A cmt. c (stating that apportionment is available for successive injuries); *id.* § 881 illus. 1, 2 (illustrating apportionment between polluters).

[35] *See Restatement (Third)* § 26; *id.* cmt a ("No party should be liable for harm it did not cause . . . ."); *id.* cmt. f ("All that is required is a reasonable basis for dividing the damages."); *Restatement (Second)* § 433A; *id.* § 881 (where "there is a reasonable basis for division" of

To apportion damages, it is not essential that particular harms be capable of precise attribution to particular causes. Rather, in accord with the common-law tradition, the question is whether "a factual basis can be found for some rough practical apportionment." *Prosser on Torts* § 52 (5th ed.); see also *Restatement (Third)* § 26 cmt. f ("The fact that the magnitude of each indivisible component part cannot be determined with precision does not mean that the damages are indivisible. All that is required is a reasonable basis for dividing the damages.").

As with the historical tradition, the evolving common law apportions damages by causation in numerous situations. "Apportionment principles are applied to tortious and nontortious conduct, to parties joined as defendants and those not joined, to both plaintiffs and defendants, to pre-existing conditions, and to forces of nature." Boston, *supra*, at 299; see also *Restatement (Second)* § 433A cmts. a, e, f. Indeed, many of the same factual scenarios in which common-law courts historically apportioned damages reappear in the modern cases. Of particular relevance here, damages are apportioned among multiple tortfeasors that pollute a single source, see *id.* cmts. a, c, d, illus. 5; *Prosser on Torts* § 52, at 345-46 (5th ed.), and among successive tortfeasors, *Restatement (Second)* § 433A cmt. c; *Restatement (Third)* § 26 cmt. f.

Likewise, modern courts have recognized that injuries caused by toxic exposure are amenable to apportionment among contributing causes. See Boston, *supra*, at 301 ("[P]rinciples of comparative causation are especially relevant in the toxic torts area, where measures of toxicity can be applied to determine apportionment."). Unlike a multi-car collision, for instance, in which injuries may not reasonably

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injury based on the contribution of independent tortfeasors, "each is subject to liability only for the portion of the total harm that he has himself caused"); *accord* Uniform Comparative Fault Act § 4, 12 U.L.A. 143 (1996); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979).

be allocated to separate causes, see, *e.g.*, *Kalland* v. *North American Van Lines*, 716 F.2d 570, 573-74 (9th Cir. 1983) (Kennedy, J.), injuries in an asbestos case are readily apportionable based on causation. Thus, in *Moore* v. *Johns-Manville Sales Corp.*, the Fifth Circuit concluded that the jury properly apportioned damages between manufacturers of asbestos-containing products based on the length of the plaintiff's periods of exposure, the quantity of asbestos contained in each product, and the extent to which those products emitted asbestos fibers. 781 F.2d 1061, 1064 (5th Cir. 1986). Other courts have reasoned similarly.[36]

2. The Modern Trend Favors Apportionment Even When Injuries Cannot Be Apportioned Based Upon Causation.

The preference for apportionment reflected in the evolving common law has progressed beyond apportionment by causation; most States now apportion even indivisible harms, and "[t]he clear trend over the past several decades has been a move away from pure joint and several liability." *Restatement (Third)* § 17 rptr's note cmt. a. Sixteen States have adopted several liability in such cases. See *id.* § 17, at 154 (listing States). Twenty other States have adopted intermediate doctrines, see *id.* at 156-59 (listing States), many of which

[36] *See, e.g.*, *Panther* v. *Raybestos-Manhattan, Inc.*, 701 P.2d 145, 146 (Colo. Ct. App. 1985) (holding that plaintiff's exposures to the asbestos products of four defendants, resulting in asbestosis, constituted "multiple, but independent, torts" that were apportionable); *see also Brisboy* v. *Fibreboard Corp.*, 418 N.W.2d 650, 655 (Mich. 1988) (approving jury's apportionment of damages based on comparative causation between cigarette smoking and asbestos exposure); *Dafler* v. *Raymark Indus.*, 622 A.2d 1305 (N.J. 1993) (same), *aff'g* 611 A.2d 136, 141-45 (N.J. Super. Ct. App. Div. 1992). Although the court below allowed the jury to consider smoking here as comparative negligence, smoking may be regarded as an independent cause (and indeed must be in strict-liability FELA actions, where contributory negligence is not a defense, *see* 45 U.S.C. § 53).

impose several liability under most circumstances.[37] These modern schemes use a variety of methods to apportion damages. Most common is apportionment based on comparative responsibility, which requires juries to consider factors such as "the nature of the person's risk-creating conduct" and "the strength of the causal connection between the person's risk-creating conduct and the harm." *Restatement (Third)* § 8. In recent years, courts have apportioned a variety of harms on this basis, including asbestos-related injuries. See, *e.g.*, *Owens-Corning Fiberglass Corp.* v. *Parrish*, 58 S.W.3d 467, 479-81 (Ky. 2001); *Kapsis* v. *Port Auth.*, 712 A.2d 1250, 1257 (N.J. Super. Ct. App. Div. 1998); *A.W. Chesterton* v. *Fisher*, 655 So. 2d 170, 171-72 (Fla. Dist. Ct. App. 1995). Indeed, some courts have held, in the context of evaluating a plaintiff's comparative negligence under FELA, that comparative responsibility is the required method of apportioning damages.[38]

[37] *See, e.g.*, Cal. Civ. Code § 1431.2 (several liability, except for economic damages in certain actions); Conn. Gen. Stat. § 52-572h (several liability, except plaintiff unable to collect for one year may seek reapportionment of uncollectable share); N.Y. C.P.L.R. § 1601(1) (several liability if defendant less than 50% at fault). This Court considers statutes no less than judicial decisions in devising federal common law rules. *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375, 391 (1970).

[38] *See Sears* v. *S. Pac. Co.*, 313 F.2d 498, 502-03 (9th Cir. 1963) (the jury must consider both the "'quantity and quality'" of negligence (quoting *N.Y., Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914))); *Holweger* v. *Great N. Ry.*, 130 N.W.2d 354, 360-62 (Minn. 1964); *see also Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114 (1913); *cf. United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) (holding in an admiralty case that "liability for . . . damages is to be allocated among the parties proportionately to the comparative degree of their fault"). Although this Court need only decide in this case that apportionment is available, other authorities—similarly reasoning that rough apportionment is better than depriving a deserving plaintiff of recovery or unjustly mulcting a defendant for the entirety of damages for which it is only partially responsible—have advocated still other approaches to apportionment. Some have advocated per capita apportionment, *see Restatement (Third)* § 26 rptr's note cmt. c, at 334-35; Boston, *supra*, at

3. Apportionment Has Been Recognized Pursuant To The Federal Common Law Developed Under Other Federal Statutes.

Following this modern trend, the federal courts have recognized a right to apportionment in developing a federal common law to govern various federal statutes.

This Court has held that damages should be apportioned under the federal labor laws. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the Court apportioned damages between an employer that discharged an employee in violation of a collective bargaining agreement and a union that breached its duty to provide fair representation. Applying "principles of federal common law," *Clayton* v. *UAW*, 451 U.S. 679, 686 (1981), this Court held that liability would be apportioned "between the employer and the union according to the damage caused by the fault of each," because in the absence of concerted action, "joint liability for either wrong would be unwarranted," *Vaca*, 386 U.S. at 197-98.

Similarly, the courts of appeals have unanimously held that apportionment is available under CERCLA.[39] This body of case law is persuasive, as CERCLA resembles FELA in

341, which was the default method of contribution at common law, *see* 1 S. Speiser et al., *The American Law of Torts* § 3:23, at 468 (1983) ("*American Law of Torts*"). Other courts have apportioned damages based on the defendant's share of the relevant market, even though, as the California Supreme Court has noted, "it is probably impossible . . . to determine market share with mathematical exactitude." *Sindell* v. *Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *see also Hymowitz* v. *Eli Lilly & Co.*, 539 N.E.2d 1069, 1078-79 (N.Y. 1989); *Wheeler* v. *Raybestos-Manhattan*, 11 Cal. Rptr. 2d 109, 112-13 (Cal. Ct. App. 1992) (asbestos case).

[39] *See United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992); *United States* v. *Monsanto*, 858 F.2d 160, 171 (4th Cir. 1988); *In re Bell Petroleum Servs.*, 3 F.3d 889, 903 (5th Cir. 1993); *United States* v. *Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998); *United States* v. *Hercules*, 247 F.3d 706, 718-19 (8th Cir.), *cert. denied*, 122 S. Ct. 655 (2001).

numerous respects. Both (1) are interpreted in light of "traditional and evolving common law principles," *United States* v. *Hercules*, 247 F.3d 706, 717 n.9 (8th Cir.), *cert. denied*, 122 S. Ct. 655 (2001); (2) impose strict liability under certain circumstances, *Kernan*, 355 U.S. at 431; *In re Bell Petroleum Servs.*, 3 F.3d 889, 897 (5th Cir. 1993); (3) permit plaintiffs to establish liability under a reduced standard of causation, *Rogers*, 352 U.S. at 506; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992); and (4) commonly involve multiple actors contributing to a single harm where relative causation is not perfectly certain. To offset the harsh outcomes that CERCLA's reduced causation standard might otherwise impose upon marginally culpable parties, *Bell*, 3 F.3d at 897; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993), courts have insisted on apportionment whenever there is "evidence sufficient to permit a rough approximation." 3 F.3d at 904 n.19.[40] Not only does this result in fairer outcomes; it also encourages plaintiffs to sue all responsible parties in a single action, rather than target wealthier defendants, as occurs under joint and several liability. Boston, *supra*, at 374-75.

D. The Adoption Of An Apportionment Regime Is Supported By Sound Policy.

In addition to finding support in the text of FELA and the historical and evolving common law, apportionment is supported by numerous policy considerations, which should

[40] *See also Bell*, 3 F.3d at 903-04 (permitting apportionment between chromium polluters of water supply based on numerous factors, including the length of time each defendant owned the offending plant; the amount of chrome-plating activity; relative sales; and testimony regarding each company's practices). Indeed, courts have apportioned damages even when the commingling of substances caused synergistic effects, relying on such factors as "the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site." *Monsanto Co.*, 858 F.2d at 172 n.26; *see also Hercules*, 247 F.3d at 718 ("commingling is not synonymous with indivisible harm'" (quoting *Alcan*, 990 F.2d at 720)); *Alcan*, 964 F.2d at 269-70 & n.29.

inform this Court's interpretation of the statute, see *Gottshall*, 512 U.S. at 541, 557; *Buckley*, 521 U.S. at 436.

First, as noted above, apportionment works with FELA's reduced causation standard to effectuate a core principle of tort law—that a tortfeasor should be held liable only for the damage that it causes.[41] Causation requirements are often relaxed in toxic exposure cases to permit plaintiffs to recover more readily.[42] Under CERCLA, Congress recognized the potential injustice to defendants of such relaxed standards, and "left it to the courts to fashion some rules that will, in appropriate circumstances, ameliorate this harshness." *Bell*, 3 F.3d at 897.[43] Just such an injustice often occurs under FELA, because the railroads' perceived deep pockets combine with the reduced causation standard to render them an inviting target. If joint and several liability is applied, as it was by the trial court in this case, a railroad employee has every incentive to sue only the railroad, no matter the length

[41] Boston, *supra*, at 370. For this same reason, railroads should not be held to a higher standard of evidentiary certainty in proving the relative contribution of various causes than plaintiffs bear in proving that the railroad was a legal cause of the injury. *See id.* at 371 ("If corrective justice accepts the requirement of causation-in-fact, and that the inquiry can never eliminate all causal indeterminacy, then it should embrace an apportionment model based on the very same evidence that was relied upon to establish causation.") (footnote omitted); *cf. Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973) (applying in a FELA case the same causation standard to employee and employer negligence); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 822-24 (5th Cir. 1965) (same).

[42] *See Prosser on Torts* § 41, at 267-68 (5th ed.); R. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers*, 37 Wake Forest L. Rev. 97, 138 (2002); D. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1775-76 (1997).

[43] This Court echoed these same concerns when it abandoned the rule of divided damages (often harsh to ships that were only slightly at fault and lightly damaged) in favor of proportionate liability in maritime collision cases (which require both negligence and causation). *Reliable Transfer*, 421 U.S. at 405.

of his tenure or the degree of the railroad's culpability. Nothing in FELA's purposes supports such an unfair rule.

Apportionment is also superior to the other alternative to joint and several liability, a contribution-only regime. First, unlike contribution, apportionment promotes judicial economy by obviating the need to retry these scientifically and medically complex cases in another forum—a task that is both wasteful, and virtually impossible for railroads in occupational exposure cases, where the railroad was not involved in the other exposures. See G. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Envtl. L. 549, 617, 619 (1995). Apportionment suffers none of these problems, as it permits difficult questions of causation to be resolved in a single action and with the participation of the plaintiff, who is in the best position to show which parties caused his injuries.[44]

Finally, the interaction between FELA's reduced standard of causation and a contribution-only scheme produces systemic inequities. As discussed above, a FELA plaintiff can often recover from a railroad under the reduced causation requirement set forth in *Rogers*. 352 U.S. at 506. But thus far, railroads have been forced to seek contribution from third parties pursuant to ordinary principles of negligence, including standard causation requirements. See *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985). As

[44] Furthermore, unlike contribution, apportionment promotes "[o]ne of the purposes of the Federal Employers' Liability Act," which is "to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 60-1386, at 3 (1908)). Contribution undercuts this goal, as it predicates a FELA defendant's right to recover from a third party upon state laws of contribution and indemnity, which vary widely. *See, e.g., Shields* v. *Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987). Some jurisdictions allow contribution only after a joint judgment; others require only a finding of common liability. 1 *American Law of Torts* § 3:19, at 452. Still others recognize no right of contribution. *Id.* § 3:15.

a result, a plaintiff could recover the entirety of his damages from a marginally culpable railroad, which may then have no recourse against significantly more culpable third-party tortfeasors. (Indeed, many third-party employers will then be able to invoke their participation in worker's compensation insurance as an absolute defense to contribution. *Restatement (Second)* § 886A cmt. g.) Hence, a contribution-only scheme transforms the railroad into the insurer of its employees' health, permitting the employee to recover damages from the railroad that could not be recovered from a third party, either by the railroad or by the plaintiff himself. Rather than sanctioning such a result, this Court should permit damages to be apportioned, thereby harmonizing the interests of railroads and employees, promoting judicial economy, and maintaining the national uniformity envisioned by Congress.

E. The Trial Court Erred By Failing To Instruct The Jury To Apportion Damages In This Case.

Petitioner N&W should not have been held liable for the entirety of respondents' damages, given the minimal evidence of causation. Each respondent bears the burden of proving that the exposure for which the railroad was responsible was a legal cause of his claimed injury—*i.e.*, the railroad exposure must have been "in reasonable medical probability" a substantial factor in developing the disease. *Rutherford* v. *Owens-Ill., Inc.*, 941 P.2d 1203, 1223 (Cal. 1997).[45] Respondents cannot satisfy that burden by proving only, for

[45] *Restatement (Second)* § 431(a); *id.* § 433(a); *Restatement (Third)* § 26 cmts. k-m. The slight-cause standard of *Rogers* does not apply to this question. *Rogers* based that standard on FELA's textual directive that the employer is liable for *railroad* injury caused "in whole or part" by the carrier's negligence. 352 U.S. at 506-07 & n.14 (citing 45 U.S.C. § 51). Thus, *Rogers* provides only that the railroad is responsible for a railroad exposure when its negligence was the slightest cause of that injurious exposure. But the railroad exposure itself must still be a substantial factor in causing the asbestos-related injury. *See Gavagan* v. *United States*, 955 F.2d 1016, 1019-20 (5th Cir. 1992) (Jones Act).

example, that the railroad made a "minimal" contribution to their injuries. See, *e.g.*, JA 236-37.

Furthermore, under any approach to apportionment, respondents' damages should have been apportioned here. Under the common-law rules that have existed since the time of FELA's enactment, damages are apportioned between other causes (tortious or innocent) and pre-existing conditions on any reasonable basis. See *Restatement (Third)* § 26 & cmts. a, f; *Restatement (Second)* § 433A. Here, respondents' injuries are analogous to damages caused by pollution, and the injuries suffered by Butler, Ayers and Spangler were successive. Indeed, respondents' injuries are particularly amenable to apportionment by causation, because asbestosis is dose-related, thus permitting damages to be divided among respondents' various exposures. The pollution of a lung by asbestos, and the resulting asbestosis, is analogous to a polluted stream in a CERCLA case. Just as the Fifth Circuit has used periods of factory ownership to apportion damages in a CERCLA case, see *Bell*, 3 F.3d at 903, so too can asbestos injuries be apportioned based on periods of exposure at different workplaces. Indeed, respondents' counsel conceded that it was "common sense" that two years of exposure contributes more to a disease than two months, JA 476, and respondents' expert assessed the relative causal contribution of different exposures on the basis of time of employment, see, *e.g.*, JA 195, 237. And just as volumetric evidence can serve as a proxy for the amount of a pollutant contributed to a site by a party under CERCLA, evidence regarding the level and intensity of exposure to asbestos can likewise establish a railroad's contribution to an employee's occupational disease. These indicators—and others, such as epidemiological evidence—more than qualify as the "reasonable basis" for apportionment required by the common law.

Finally, the evolving common law permits apportionment by comparative responsibility for indivisible injuries. Under

this approach, the jury considers many of the same facts that bear on causation, as well as factors like knowledge, scienter, and the degree of causal link. Here, varying degrees of culpability should be assigned to petitioner's conduct, as well as to respondents' other workplace exposures and the tortious conduct of third parties, including the asbestos manufacturers' failure to warn railroads and their employees of potential dangers. See, *e.g.*, JA 127-31. Such determinations are well within the province of the jury. *Moore*, 781 F.2d at 1064-65; *Kapsis*, 712 A.2d at 1257.

Thus, injuries and damages must be apportioned by causation whenever reasonably possible, in accord with the common-law tradition; and by principles of comparative responsibility when a defendant is a legal cause of all or part of an injury that is indivisible by causation. Such a rule effectuates FELA's textual mandate that railroads be held liable for only the injuries they cause, and avoids the inequities inherent in the long-abandoned rule of joint and several liability. Because the proper apportionment rule was not applied here, there should be a new trial as to all respondents.

CONCLUSION

The judgments of the Circuit Court should be vacated and the cases remanded for a new trial.

Respectfully submitted,

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NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

On Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia

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QUESTIONS PRESENTED

The Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, provides that a railroad is liable in damages for injuries to railroad employees "resulting in whole or in part" from the railroad's negligence. Respondents prevailed in a jury trial brought pursuant to FELA against petitioner based on injuries resulting from petitioner's negligence in exposing respondents to asbestos at the workplace. The questions presented are:

1. Whether the trial judge properly instructed the jury that a plaintiff railroad employee who has a reasonable fear of cancer because he is suffering from a physical disease caused by the defendant railroad employer's negligently exposing the plaintiff to asbestos is entitled to be compensated for that mental injury under FELA.

2. Whether the trial judge properly declined to instruct the jury in a FELA lawsuit to apportion damages between the defendant railroad employer and absent third parties where the plaintiff railroad employees were suffering from indivisible injuries caused by the railroad's negligence.

LIST OF ALL PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below and are respondents in this case:

Carl Butler

Doyle Johnson

John Shirley

James Spangler

Clifford Vance

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STATEMENT

Petitioner Norfolk & Western Railway Company seeks to overturn a jury verdict reached after a two week trial in a negligence action brought in a West Virginia state trial court by respondents pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51. The jury found that petitioner negligently exposed respondents, six former railway workers, to asbestos while in petitioner's employment and that they were each suffering from a physical disease (asbestosis) that had been caused by that exposure. The trial court denied petitioner's motion for judgment notwithstanding the verdict or for a new trial and the state supreme court denied review.

I. Background: Asbestos, Asbestosis, and Cancer

Asbestos refers to a family of crystalline hydrated silicates that are strong, flexible, resistant to heat, and very durable. Because of these physical characteristics, asbestos was used by many industries during the 19th and 20th centuries, especially for fireproofing and insulation. As trumpeted by one early industry publication, asbestos "[s]o closely * * * fit the needs of this new world of steam, electricity and blazing furnaces, that it seems to have been almost purposely designed." Johns-Manville, Inc., *Johns-Manville Service to Railroads*, 5 (1923). Railroads used asbestos in their steam locomotives because asbestos kept the heat in the boiler. Railroad workers wired layers of asbestos blocks around the boilers and then used a cement mix of asbestos powder and water to fill in the gaps. Railroads also used asbestos in brake linings, pipes, and roofings. JA155-56; App., *infra* A1-A2 (trial exhibit photos of asbestos on engines).

Railroads, such as petitioner, overhauled the steam locomotive engines every few years. The areas of greatest exposure to asbestos were in the rooms where the overhauling took place. To overhaul an engine, the asbestos would be stripped off, collected from the floor, ground up, reprocessed back into an asbestos-mud, and finally reapplied to the engine. The entire process led to clouds of asbestos dust. Other major

sources of asbestos exposure were working steam engines, overhead pipes, and roofing. JA 155-56.

Asbestos is hazardous to human health because the small size and shape of its fibers allow their entry into the small airways in the lower areas of the lungs. The lungs extract oxygen from the air and move it into the bloodstream for transportation throughout the body. The lung is very flexible because it contains elastic, very thin connective tissue that allows the oxygen in the air to be breathed in and out by the lungs for diffusion into the blood stream. JA 85-88.

Breathing in asbestos fibers can cause asbestosis -- diffuse interstitial fibrosis of the lungs – because of the particular way that lung tissue reacts to the presence of asbestos fibers that reach the air spaces within the lung. As the number of fibers increases, the lung is unable to rid itself of the fibers and the lung responds to their presence by forming scar tissue in a process called "fibrosis." This scar tissue impairs the respiration capacity of the lungs in two distinct respects. First, as the otherwise thin walls become thickened with scar tissue, the lung itself become stiff and inflexible. This stiffness restricts an individual's ability to breathe. Second, the diffusion capacity of the lung becomes compromised because oxygen and carbon dioxide cannot move as efficiently through an area with scar tissue. The air spaces that contain the tiny capillary blood vessels responsible for spreading oxygen throughout the body become blocked by the scar tissue. JA 85-92; App, *infra*, A3-A11.

Only a small percentage of those who are exposed to asbestos fibers get asbestosis. Whether asbestosis results depends on many factors, such as the intensity of exposure, duration of exposure, circumstances of exposure, fiber type, and individual susceptibility. Approximately one-third of the lung needs to be scarred before asbestosis is detectable by chest x-ray, with an average latency period between exposure and the disease of twenty years. Asbestosis is generally a progressive disease, meaning it continues to worsen long after the initial period of exposure is over. The fibers remain in the lung and the amount of scarring can increase over time. JA 87-88, 91-92, 150, 211,

421, 457; Trial Trans. 147-48 (4/15/98).[1]

Medical diagnosis of asbestosis generally requires application of a series of criteria set forth by the American Thoracic Society (ATS). Because it is too harmful to the patient to obtain samples of lung tissue for direct analysis, the ATS sets forth two necessary elements and four specific medical inquiries of "recognized value" to support a diagnosis of asbestosis. The medical profession has further developed a series of examinations that a doctor can pass in order to be certified as possessing particular expertise for determining from a chest x-ray whether a patient has a pulmonary lung disease such as asbestosis and, if so, the disease's current stage. JA146-47, 158-67, 178, 198-99, 239; App., *infra*, A11-A21 (ATS guidelines).

The most common physical symptom of asbestosis is progressively worsening shortness of breath, which can be extremely debilitating. See note 10 *infra*. This sensation is directly linked to marked decrease in lung flexibility and reduction in diffusion capacity. Asbestosis can itself be fatal as the degree of the scarring and lung impairment increases over time. There is no effective treatment. JA 85, 87-92, 150, 464.

There are two major forms of cancer caused by asbestos exposure. The first, mesothelioma, is a cancer of the lining of the lung and is a very painful disease that is almost always fatal. The second form is lung cancer. It is currently not possible to predict with reasonable medical certainty that any exposed person will develop either cancer. JA 93, 96, 154.

Persons suffering from asbestosis, however, are far more likely to get both types of cancer than those without asbestosis, because their asbestosis confirms the intensity of their exposure, the extent of lung infiltration, and their body's particular adverse reaction to the fibers' presence, which varies by

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[1] The scarring that results from asbestosis is distinct from scarring on the lining of the lung, which is called "pleural plaque." Unlike asbestosis, pleural plaque does not infiltrate the lung and does not, standing alone, generally cause lung impairment. The physical damage caused by asbestosis is physically distinct from that caused by smoking. Smoking impairs the ability of an individual to exhale (expiration), while asbestosis impairs the ability to inhale (inspiration). JA 90-91, 216, 421-23

individual. For lung cancer, many scientists believe (including petitioner's own expert) that the increased risk is present only for those with asbestosis and not for those just exposed to asbestos.[2] Although that is not true for mesothelioma, ten percent of those with asbestosis die of mesothelioma. Thirty-nine percent of patients with asbestosis who smoke die of lung cancer, compared to lung cancer rates of only ten to fifteen percent for smokers who have not even been exposed to asbestos. The lung cancer rate for nonsmokers exposed to asbestos is between two and five percent. JA 92-97, 470-71.

II. Proceedings Below

This action is a consolidation of the complaints filed by respondents, six former railway employees, in the Circuit Court of Kanawha County, West Virginia, against petitioner Norfolk & Western under FELA for injuries allegedly caused by petitioner's negligence in exposing respondents to asbestos. Because the trial resulted in a jury verdict in respondents' favor, the trial evidence must now be considered in the light most favorable to respondents, which means the Court "must draw all reasonable inferences in favor of [respondents]" and "disregard all evidence favorable to the [petitioner] that the jury [wa]s not required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 151 (2000).

1. At trial, respondents, all West Virginia residents who worked for petitioner in West Virginia, established that because of petitioner's negligent conduct they were each substantially exposed to asbestos while in petitioner's employment and are

[2] See Andrew Churg & Francis Green, *Pathology of Occupational Lung Disease*, (1987) ("It should be appreciated that asbestosis is the only generally accepted indicator of an asbestos etiology for lung cancer."). Although petitioner's own expert agreed (J.A. 470) that the increased risk of lung cancer exists only for those exposed individuals who have asbestosis, other reputable scientists believe that those exposed but without asbestosis also face heightened cancer risks, simply much less so. *E.g.*, Kevin Browne, *Is Asbestos or Asbestosis the Cause of the Increased Risk of Lung Cancer in Asbestos Workers?* 43 British J. Indus. Med. 145 (1986).

now suffering from asbestosis as a result. All the respondents worked for significant periods of time in those employment areas where concentrations of asbestos fibers in the air were especially high, including where asbestos was directly handled and where asbestos was stripped off and reapplied to steam engines.[3] "[T]errible" and "extreme" clouds of asbestos dust resulted from those practices. JA 340. Respondents were also exposed to asbestos from pipes, freight houses, brakes, and operating steam engines in working for petitioner. JA 112, 192-93, 198, 201, 205, 282-86, 303-04.[4]

Each respondent is suffering from asbestosis according to objective medical diagnoses performed by a Board-certified medical expert in pulmonary and lung disease who is also National Institute of Occupational Safety and Health-certified to read chest x-rays for the diagnosis of asbestosis. The

[3] Respondents Vance, Ayers, Johnson, and Butler all worked where the asbestos stripping and reapplication occurred (JA 102-07, 112, 167-68, 198, 201, 266-73, 303-04, 328); respondent Shirley handled asbestos sheets and cleaned up broken bags of asbestos (JA 192-93, 282-86); and respondent Spangler was directly involved in the stripping and the application of asbestos on the engines (JA 205, 338-39). See P. Tr. Exhibs. 2-3. Photos, App., *infra* A1-A2. Almost all of the respondents were employed for decades by petitioner, ranging over 4, 5, 14, 30, and 38 years (JA 106, 192, 198, 201, 205), except for respondent Butler. Although Butler was subject to asbestos exposure for only three months in petitioner's employment, and further exposed in his future employment as a pipefitter, Butler's exposure at petitioner's workplace was especially intense. He worked during that time in the repair shop in close proximity to where asbestos was stripped and reapplied and where, as a result, the air he inhaled was exceedingly dusty with asbestos fibers. JA 249-50.

[4] Although petitioner learned of the public health hazards of asbestos exposure in the workplace beginning in the 1930s, petitioner took none of the industry-recommended precautions on behalf of any respondent. Petitioner did not advise any of them of asbestos hazards. Petitioner did not tell respondents how to reduce the amount of asbestos dust in the air or otherwise make the workplace less hazardous. Respondents were not told to wet down the dust or instructed to wear masks or respirators of any kind. Finally, petitioner did not take any dust measurements during respondents' employment or promote respondents' obtaining chest x-rays. JA 113-14, 252-53, 293-94, 343-44.

diagnoses rely on the necessary threshold facts that each respondent was subjected to substantial asbestos exposure and a sufficient amount of time has elapsed since that exposure for asbestosis to develop. Most tellingly, the diagnoses are based on the ATS-established diagnostic tests of "recognized value."[5]

Respondents are suffering from serious physical and mental injuries because of asbestosis and their impairment is progressively worsening. One respondent stated that his "shortness of breath" meant that he "just can't breath. * * * I just feel like I'm gonna fall dead * * *." JA 114. Others explained that the physical effect was so debilitating that they could not "walk a distance" or could walk only about a block. JA 262, 276, 330. One respondent requires six minutes to walk 110 feet to

[5] The chest x-rays of each respondent reveal asbestosis of the lung. JA 178-81, 184, 193, 198, 199, 202, 204, 205-06. For respondent Spangler, the asbestosis has already progressed to an even more advanced stage, but the disease is likely to worsen for all respondents over time. JA 206; see *id.* at 171, 186, 195, 198, 203. Five respondents also suffered from diffusion impairment consistent with asbestosis. JA 169-70, 193-94, 200, 202, 206. Physical examination of the lungs, using a stethoscope, revealed rale sounds in the chests of several respondents, including the one whose diffusion capacity appeared normal, which further corroborated asbestosis. JA 168-69, 184, 193. At trial, a medical expert testified that some respondents also exhibited lung damage from smoking, but that the evidence of asbestosis -- especially the chest x-rays and diffusion impairment -- was physically distinct for diagnostic purposes from that caused by either smoking or pleural plaques. JA 171, 185, 189, 202, 208-09.

Petitioner improperly now tries to relitigate the facts and in doing so misstates the trial evidence. Respondents' expert did not "concede[] the absence of ATS-recommended criteria" for respondent Ayers. Pet. Br. 7 & n.6. The expert found those criteria met. JA 201-03. Petitioner's reference to "corrected" diffusing capacity is misleading because, as established at trial, this so-called correction does not measure for asbestosis impairment, which is why it is not used by the ATS guidelines for measuring respiratory impairment Petitioner's own expert conceded just that. JA 165-66, 477-78, 483, 522-23. Petitioner is likewise mistaken in now contending (Br. 4 n.3) that a lung profusion reading of 1/1 is required to support a diagnosis of asbestosis. The evidence at trial established that a 1/0 reading is sufficient evidence of abnormality to support an asbestosis diagnosis according to the author of the ATS guidelines and to both petitioner's and respondents' medical experts. JA 199, 240, 432, 460.

get the mail and back, after which he has to sit down and rest. JA 206, 356. The impact on another respondent's lung is so severe that "no matter what I do, I could just be talking and I'll run plum out of breath." JA 294-95.

At trial, respondents established the seriousness of the mental injuries caused by their asbestosis. In addition to the obvious trauma from their growing physical incapacity to engage in normal life activities, there was testimony about the emotional trauma directly linked to shortness of breath. Respondent Spangler described how his worsening condition was causing him emotional distress. JA 357. Respondent Shirley stated it was making "a nervous wreck out of me" and he "g[o]t depressed sometimes." JA 298.

Respondents also proved at trial both their fear of getting either lung cancer or mesothelioma and the reasonableness of that fear based on their asbestosis. There was trial testimony regarding the significantly enhanced risk of those cancers for those with asbestosis (see pp. 3-4, *supra*), as well as the mental injury caused by the knowledge of those risks. There was also testimony that respondents were the kind of individuals who understated their fears. JA 116, 255, 277, 299, 331, 354.

2. During jury selection, the trial judge granted respondents' motion that petitioner not be allowed either to refer in *voir dire* or to introduce at trial evidence of other lawsuits or settlements that respondents may have filed against or entered into with other parties relating to their asbestos-related injuries. Trial Tr. 32-38, 148-49 (April 13, 1998); JA 66-73. In considering the motion, the trial judge repeatedly questioned whether petitioner was planning to introduce evidence of the negligence of other tortfeasors in support of apportionment of fault and, if not, what did petitioner suggest the jury was "going to apportion with?." JA 69. Petitioner denied intent to introduce evidence with respect to manufacturers and mentioned only the possibility of "apportionment" based on the fact that several respondents were smokers. JA 68-71. The trial court's order pertained only to evidence of the filing of other lawsuits and settlements, and it did not preclude petitioner from introducing evidence of the culpability of manufacturers or nonrailroad employers. See JA 126 ("evidence that [respondents] have sued

the manufacturers and might have received settlement").[6]

3. Petitioner also requested two jury instructions that the trial judge denied. Petitioner requested an instruction that there could be no award of "damages to plaintiff for fear of cancer" unless the jury found *both* that (1) "he has an actual likelihood of developing cancer" and (2) "he has experienced physical manifestations caused by fear of developing cancer." JA 548. Petitioner did not contend (as it does now) that physical manifestations would suffice for recovery or that mental injury must be "severe." The trial judge instead instructed the jury that "any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you award for pain and suffering" for that physical injury. JA 573. The judge further instructed that because "none of the plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future. * * * [Y]ou cannot award damages to plaintiffs for cancer or for increased risk of cancer." *Id.*

The trial judge also denied petitioner's "apportionment" instruction. Petitioner requested that the jury be instructed that if it finds that the "plaintiff in this case has a condition or disease which was caused by his employment with employers other than the railroad, plaintiff's recovery must be limited to only such damages as result from his railroad employment and he cannot recover damages which have been or will be caused by his non-railroad employment." JA 539. Petitioner further

[6] Other evidence related to manufacturers denied admission by the trial judge was certain evidence concerning when manufacturers warned petitioner of asbestos hazards. Petitioner, however, sought to argue that the manufacturers were *nonnegligent* in lacking knowledge of asbestos hazards and, based on that alleged factual premise, hoping to persuade the jury that petitioner was likewise nonnegligent. See JA 127 ("The purported evidence would be that [the manufacturers] didn't warn because the general state-of-the-art was such that nobody knew enough to do anything."). In denying petitioner the freedom to suggest that the manufacturers were nonnegligent, the judge did not limit petitioner's ability to introduce evidence of manufacturer *negligence*, which both respondents and the court agreed was in bountiful supply. See JA 126-37.

proposed a verdict form that would have allowed the jury to allocate percentages of damages to petitioner, each respondent (based on smoking), and "Other Employment." JA 550-60

The trial judge instead instructed the jury that plaintiff's recovery should be "reduced" and "not * * * barred" if the jury found that "a plaintiff was negligent and that plaintiff's negligence caused in whole or in part, the plaintiff's lung impairment or injury." The verdict forms provided by the judge accordingly allowed the jury to determine the "percentage of negligence" attributable to "each of the parties" in the event that the jury first found any of them contributorily negligent. JA 578-79, 582-83, 586-87. The court further instructed the jury that it was no defense to petitioner's liability that there "may be more than one cause to any injury." JA 568.

4. The jury reached verdicts in favor of respondents, but reduced damages for three respondents based on their comparative negligence by smoking. The reductions were 37, 31, and 14 percent, amounting to a $776,954.44 overall decrease. The judge further reduced the verdicts to account for settlements that respondents had entered into with other non-FELA entities. The damages ultimately awarded in the final judgments totaled $4,891,603.20. See JA 590-613; Order Modifying Judgment (9/22/99). The judge subsequently denied petitioner's motion for judgment notwithstanding the verdict or in the alternative for a new trial. Pet. App. 3a-4a.

5. The West Virginia Supreme Court denied discretionary review. Pet. App. 1a-2a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner sets forth two claims. Petitioner's first claim is that the trial court erred in allowing the jury to award any damages based on fear of cancer. Petitioner's second claim is that the trial court erred in holding petitioner liable for all of respondents' injuries rather than instructing the jury to apportion damages between petitioner and other non-party tortfeasors who may also have contributed to those injuries. Neither of these contentions has any merit. Both are premised on a misreading of settled tort doctrine, which supports the jury

instructions in all respects. Both also run afoul of the Federal Employer's Liability Act (FELA), which Congress enacted in order to expand a plaintiff's ability to recover for injuries caused by a railroad's negligence. Finally, petitioner misapprehends this Court's role in reviewing trial proceedings and jury verdicts by repeatedly questioning the sufficiency of the evidence at trial and by introducing new evidence and new arguments not presented at trial. The judgment of the trial court should, accordingly, be affirmed, or the Court may wish to dismiss the writ of certiorari as improvidently granted.

1. Petitioner's first contention contravenes settled tort doctrine that permits recovery of damages for reasonably-incurred mental injuries where, as in this case, the basis of those injuries is a physical injury caused by the defendants' negligence. Contrary to petitioner's repeated insistence, this case, unlike *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), does not involve a stand-alone tort claim for negligent infliction of emotional distress. Respondents are not relying on mere "asbestos exposure" in support of their claim for recovery of mental injuries. Nor are they asserting those mental injuries as what establishes their tort cause of action in the first instance.

Respondents alleged and proved at trial that they each suffer from a serious, debilitating physical disease -- asbestosis -- caused by petitioner's negligent conduct, and petitioner cannot and "does not challenge" (Br. 2) the jury's finding of asbestosis. Respondents further established at trial the reasonableness of their fear, arising from their asbestosis, that they may suffer in the future from two painful and potentially fatal forms of cancer: mesothelioma and lung cancer. The evidence was uncontradicted at trial that those who, like respondents, suffer from asbestosis are significantly more likely to develop these cancers than those who do not, including those who have been only exposed to asbestos. Pursuant to the trial judge's instruction, the jury concluded that respondents' fear of cancer was in fact reasonably related to their asbestosis and the sufficiency of that evidence can no longer be fairly questioned.

Based on traditional and longstanding tort doctrine, recovery for such mental injuries is permissible under FELA. Once a

plaintiff establishes that the defendant's conduct has caused a physical injury, such as a serious physical disease from asbestos exposure, the plaintiff is entitled to recover for all reasonably foreseeable physical and mental injuries proximately resulting from the same "conduct which cause[d]" the initial injury. See *Restatement (Second) of Torts*, § 456 (1965). The physical disease in that circumstance satisfies the "injury" element necessary for the tort cause of action, and the mental injuries are merely an aspect of damages for an otherwise established tort.

Nor is there anything about the jury verdict to suggest that respondents' asbestosis was merely a pretext for a damage award based mostly on respondents' fear of cancer. Wholly apart from fear of cancer, the evidence at trial established the seriousness of respondents' asbestosis and its debilitating and progressively worsening impact on their daily lives. Indeed, none of the respondents sought to prove that their fear of cancer was their most substantial injury, and at least one even expressly denied just that. Because, moreover, petitioner failed to seek or obtain a jury verdict that reveals how much was awarded for fear of cancer, petitioner cannot now presume that the jury awarded too much on that one ground.

2. FELA's plain terms and settled tort law also contradict petitioner's second claim that the trial court erred by not instructing the jury to apportion damages between petitioner and absent third parties who may have contributed to the injuries of two respondents. FELA and tort law permit a plaintiff to recover his entire damages from a defendant whose negligence jointly causes indivisible personal injuries, such as a physical disease, while allowing the defendant to seek contribution from other tortfeasors.

FELA expressly imposes liability on petitioner so long as its negligence caused respondents' injuries "in part." 45 U.S.C. § 51. As repeatedly stressed by this Court, this statutory standard is met when the "employer negligence played any part, even the slightest, in producing the injury * * *. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes * * *." Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506-07 (1957). In contrast to FELA's adoption of comparative negligence, FELA

does not provide that a plaintiff's recovery must be reduced because other nonrailroad sources contributed to the plaintiff's indivisible injuries. Neither the common law in existence at the time of FELA's enactment nor the weight of common law authorities today dictate otherwise. Respondents' personal injuries resulting from asbestosis are classic "indivisible" injuries for which apportionment is not compelled.

Even if, contrary to our submission, FELA's plain language and applicable common law doctrine do not preclude apportionment for the type of indivisible physical and reasonable mental injuries resulting from asbestosis, petitioner cannot prevail by now claiming that a reasonable basis for apportionment exists. The burden of establishing any such "reasonable basis" necessarily falls on petitioner as the defendant. Here, however, petitioner made no such showing at trial, notwithstanding multiple opportunities to do so.

3. Although petitioner pays nominal lip-service to the irrefutable notion that, before this Court, petitioner may neither challenge the sufficiency of the evidence before the jury nor present new evidence not introduced at trial, petitioner's brief is riddled with efforts to do just that. Petitioner never accounts for the fact that all reasonable evidentiary inferences must now be made in respondents' favor as the prevailing parties at trial.

With regard to the first question presented, petitioner (1) questions whether respondents in fact suffer from asbestosis by repeatedly stressing the possibility of its misdiagnosis; (2) offers new evidence that asbestosis is not a serious debilitating disease; and (3) presents new evidence that respondents' fear of cancer is not reasonable. Petitioner's arguments on the apportionment issue are similarly infected by illegitimate factual allegations. Petitioner relies on fact evidence that could have been (but was not) introduced at trial to support a finding that a reasonable basis for apportionment of liability exists.

Petitioner is not entitled to a new trial based on its hypothetical notions of what it should have done at trial. Undoubtedly, there is room for "Brandeis Brief" presentations in cases raising legal issues where such historical facts may be legally relevant. Here, however, the Court has decided to review the propriety of a jury verdict and jury instructions that

were based on the evidence actually presented at trial. A party cannot introduce new evidence to impeach that verdict or those instructions or invite this Court to review the sufficiency of the evidence. For this reason, the Court may wish to consider dismissing the writ of certiorari as improvidently granted.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY THAT A PLAINTIFF WHO HAS A REASONABLE FEAR OF CANCER BECAUSE HE IS SUFFERING FROM A PHYSICAL DISEASE CAUSED BY THE DEFENDANT'S NEGLIGENCE IS ENTITLED TO RECOVER FOR THAT MENTAL INJURY AS PART OF HIS OVERALL DAMAGES

The trial judge in this case properly instructed the jury that "any plaintiff who has demonstrated a reasonable fear of cancer that is related to proven physical injury from asbestosis is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." JA 573. The trial judge's instructions were valid in all respects. It is longstanding, settled tort law that where, as in this case, a plaintiff has established that defendant's negligence has resulted in a physical injury, the plaintiff can recover for all physical and reasonable mental harms proximately related to that initial physical injury. For this reason, petitioner's claim of jury instruction error is little more than the very kind of dressed-up sufficiency of the evidence challenge that this Court has consistently declared inappropriate for plenary review.

A. Under Settled Tort Law, A Defendant Who Negligently Causes Physical Injury To The Person Of Another Is Liable For The Resulting Physical And Mental Harms, Including Reasonable Apprehension Of Future Physical Consequences

1. FELA "invests the injured employee with a right to such damages as will compensate him for his personal loss and

suffering." St. Louis I.M. & S.R. Co. v. Craft, 237 U.S. 648, 656 (1915). In construing the precise scope of damages recoverable under FELA, this Court considers, first, "FELA itself, its purposes and background," and, second, "because 'FELA jurisprudence gleans guidance from common-law developments,' * * * the common law treatment of the right of recovery asserted by respondents." Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 541-42 (1994), *quoting* Atchison, T. & S. F. R. Co. v. Buell, 480 U.S. 557, 568 (1987). Although FELA does not itself answer the question of the scope of physical and mental injuries for which a negligent defendant is liable, settled common law principles readily do.

Under settled tort law, where, as in this case, a defendant negligently causes a physical injury to another person, the defendant's liability is not confined to the physical injuries that immediately result. The initial physical injury satisfies the "injury" element necessary to establish a prima facie case of negligence, consisting of "breach of duty, injury and causation" (Gottshall, 512 U.S. at 550-551). But the defendant is liable for all physical and mental harms that proximately result from the threshold physical injury.

The scope of proximate mental injuries that may be recovered includes "pain and suffering" in the narrowest sense: pain that arises in the immediate aftermath of a physical wounding. But, contrary to petitioner's claim (Br. 15-16), it is not strictly confined to such immediate, direct pain. "In connection with proved physical injury, wrongfully caused [emotional disturbance] has long been an element in recovery, not merely where undistinguishable from 'physical pain,' but in further removed situations." Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 509 (1921).

As described by Dean Prosser in the very first edition of his *Handbook of Torts*, "[w]ith a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not being feigned." William L. Prosser, *Handbook of the Law of Torts*, 213 (1941). Hence, mental injuries that would not, standing alone, be sufficient to create liability, are recoverable as "parasitic damages" when they are the result of a physical

impact that produces a physical injury because the latter satisfies the "injury" element necessary to establish the tort cause of action. The essential correctness of this proposition, both at the time of FELA's enactment and since, cannot be seriously questioned.[7] As set forth in the *Restatement (Second) of Torts*, § 456 (1965): "If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is also subject to liability for * * * fright, shock, or other emotional disturbance resulting from the bodily harm *or the conduct which causes it* * * *" (emphasis supplied).

2. Nor can it be gainsaid that it is has long been settled tort law that such recoverable mental injuries extend to the reasonable apprehension of future physical consequences. "[E]ven if the plaintiff cannot prove that a disease will result in the future, courts have permitted recovery for reasonable fears that the impact will inflict some future disease. * * * Such cases fit the pattern of parasitic damages - emotional harm results from an initial injury and is recovered as one element of damages for that injury." Dan B. Dobbs, *The Law of Torts*, 844 (2000); Thomas G. Shearman & Amasa A. Redfield, III *A Treatise on the Law of Negligence* § 761 (6th ed. 1913) ("The mental suffering which may be allowed for includes such as arises from the plaintiff's reflections upon what he personally has to endure."). There is simply no merit, therefore, to petitioner's contention (Br. 15-16) that mental injury based on fear of future consequences such as cancer are recoverable only as "stand-alone negligently inflicted emotional distress."

Cases involving fear of cancer based on asbestosis did not exist at the time of FELA's enactment, but there are plenty of historical and contemporary analogues in the case law. See

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[7] See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1048-49 (1936); Archibald Robinson Watson, *A Treatise on the Law of Damages for Personal Injuries*, 500-01 (1901); Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 Am. L. Rev. 141, 142 (1902); Thomas A. Street, I *The Foundations of Legal Liability - Theory and Principles of Tort*, 460 (1906); Francis H. Bohlen, I *Cases on the Law of Torts* 215 (1915); Fowler V. Harper, *Readings in Torts*, 1225-26 (1941).

David Minneman, Annot, *Future Disease or Condition, or Anxiety Relating Thereto, As Element of Recovery*, 50 A.L.R. 4th 13 (1986). Perhaps most directly analogous are the legion of dog bite and blood poisoning cases during the late 19th and early 20th centuries in which plaintiffs recovered damages both for the physical wounding of the immediate bite and for the fear of future disease (rabies, lockjaw) caused by the possibility that harmful germs were injected into the victim's bloodstream. The courts routinely allowed for recovery of mental injury based on fear of future disease, wholly apart from the physical harm (and immediate mental harm) caused by the initial wounding itself.

In *Ayers v. Macoughtry*, 29 Okla. 399 (1911), for instance, the plaintiff stated simply at trial that he was "in fear of acquiring [rabies]" and, because of that fear, "there was a good deal of anxiety, and I experienced it." *Id.* at 402. Based on that testimony, the Oklahoma Supreme Court upheld the trial court's instruction to the jury that in determining the amount of damages, "you may take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results therefrom." *Id.* at 404.[8] In *Buck v. Brady*, 110 Md. 568 (1909), another dog bite case, the defendant objected to the plaintiff's being allowed to testify in response to the question "Have you any fear now" of rabies, "Yes, sir; I still worry about it." The Maryland Supreme Court held that there was no error in allowing this testimony, relying on an earlier decision of the Vermont Supreme Court: "'The apprehension of poison from the bite of the dog, and the fear and solicitude as to evil results therefrom -- all pain, anguish, solicitude, occasioned by the bite -- were proper matters for the jury in estimating the damages." *Id.* at 573, *quoting* Godeau v. Blood, 52 Vt. 251 (1880); Warner v. Chamberlain, 12 Del. 18, 21 (1884) ("fear and apprehension of hydrophobia"); Serio v. American Brewing Co., 141 La. 290, 299 (1917) ("compensate the mental suffering resulting from the knowledge that he had been bitten by a mad dog").

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[8] See Heintz v. Caldwell, 9 Ohio Cir. Dec. 412 (1898) ("we hold that the court also erred in not permitting the plaintiff to testify to the mental suffering consequent upon her apprehensions of hydrophobia and lockjaw resulting from the dogs biting her").

The courts in these cases carefully distinguished between a plaintiff's right to recover for reasonable apprehensions of future consequences and the right to recover for the future consequences themselves. The courts specifically upheld the legitimacy of recovery for the mental injury based on such apprehensions even when the consequence were themselves too uncertain to be recoverable. See Bernadsky v. Erie R. Co., 76 N.J.L. 580 (1908). The courts also endorsed the reasonableness of fears based on microscopic bodily invasions notwithstanding their potentially lengthy duration: "The ghost of hydrophobia is raised, not to down during the life-time of the victim." The Lord Derby, 17 F. 265, 267 (E.D. La 1883); Gamer v. Winchester, 110 S.W. 2d 1190, 1193 (Tex. Civ. App. 1937) ("these mental fears may be considered by the jury").

3. In none of the longstanding tort law precedent allowing for recovery of mental injuries related to a physical impact or injury was there a further requirement that the mental injuries be "physically manifested." The mental injuries needed only to be related to a physical injury, reasonable, and, like injuries of any kind, supported by evidence sufficient to sustain a jury verdict. For that same reason, of course, we do not doubt that a jury is entitled to consider the absence of physical manifestations as evidence that a mental injury is less severe and therefore less deserving of a significant award. In this case, moreover, petitioner made just such a closing argument to the jury. See JA 576. But the jury's fair consideration of that argument is all that tort law requires.

B. A Plaintiff Who Reasonably Fears Cancer Because He Has Asbestosis May Recover Damages for that Fear From A Defendant Who Negligently Caused the Asbestosis

1. In *Metro-North* , this Court ruled that a victim of asbestos exposure could not recover for mental injuries based on fear of cancer because exposure to asbestos, alone, did not amount to the threshold "physical impact" necessary for such recovery. In the instant case, however, respondents are not the victims of mere exposure to asbestos. The evidence at trial established that petitioner's negligence in exposing respondents to asbestos

has resulted in their suffering from asbestosis, which is a serious, debilitating pulmonary lung disease that progressively worsens over time. Accordingly, under longstanding tort law, petitioner can prevail only either if (1) asbestosis does not supply the requisite physical injury or (2) if respondents' fear of cancer is not sufficiently related to asbestosis to be a legitimate additional aspect of damages.

Revealingly, almost none of the lengthy briefs filed by petitioner and its supporting amici discuss at any length these essential, threshold legal and factual issues. On the significance of asbestosis, petitioner can at most muster only a footnote (Br. 21 n.13) that declares, without any elaboration, that this Court in *Metro-North* "did not decide that asbestosis, or any specific asbestos-related disease, would in fact qualify a plaintiff" for recovery of related mental injury. At least one of petitioner's amicus seeks to fill the analytical gap in petitioner's position, albeit no more convincingly. According to amicus American Insurance Association (Br. 17-18), the asbestosis diagnosis does not change the result because "asbestosis is merely a proxy for exposure to asbestos." "[T]he presence of asbestosis – the only asserted factual difference between this case and *Buckley* – adds nothing to the legal analysis." *Id.*

Such propositions are simply untenable. The legitimacy and legal sig icance of respondents' asbestosis diagnosis is incontrovertible. Notwithstanding petitioner's repeated (and improper) efforts to cast doubt on the validity and seriousness of that medical diagnosis,[9] the evidence was more than ample to sustain the jury's verdict. There was substantial evidence of respondents' significant asbestos exposure at petitioner's employment. See p. 5, *supra*. A Board-certified medical expert applied the consensus American Thoracic Society guidelines in support of that diagnosis, which even petitioner acknowledges as "authoritative" (Br. 3) and which carefully distinguishes

[9] See, *e.g.*, Pet. Br. 7 ("accounts of railroad exposure were riddled with vagueness and imprecision"); *id.* at 2 ("minimal proof of disease"); *id.* at 3 ("misdiagnosis is thus common"); *id.* at 5 ("commonly diagnose those who manifest even the slightest lung scarring as asbestotic"); *id.* at 6 ("scant evidence of asbestosis"); *id.* at 30 ("benign disease").

between lung impairments caused by asbestos and smoking. See note 1, *supra*. Contrary to petitioner's intimation (Br. 6, 8), respondents' asbestosis is not a mere, incidental inconvenience based on the "slightest lung scarring." As shown at trial, at least one-third of the lung must be scarred before asbestosis is even revealed by an x-ray, its restriction on lung inspiration capacity causes shortness of breath that significantly restricts the ability to engage in daily life activities, it worsens over time, and it is potentially fatal. See pp. 2-3, *supra*.[10]

No more subject to dispute before this Court is the jury's assessment pursuant to the jury instruction of the relationship of respondents' fear of cancer to their asbestosis. The sufficiency of that evidence is not a proper matter for this Court's review. But, in all events, the United States is simply wrong in asserting (Br. 5, 13) that "any increased risk of cancer or associated fear is not related to the physical injury that permits respondents to sue." The relationship is substantial and doubly-layered. Asbestosis is what makes respondents' fear of cancer reasonable. Indeed, petitioner's amicus, the American Insurance Association, correctly acknowledges (Br. 22) that asbestosis is "logically related" to the reasonableness of the fear of cancer because "a present injury of asbestosis makes

[10] Petitioner's description of asbestosis -- a "benign disease" lacking "any severe impairment" and causing "only" shortness of breath (Br. 8, 30) -- sharply contrasts with the description of the disease set forth by the federal Occupational Safety and Health Administration:

> [I]ndividuals with asbestosis experience a relatively long and debilitating period of morbidity. Dr. Holstein, a pulmonary physician, described a typical case:
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> > The main symptom of asbestosis is progressive shortness of breath. When this has its onset in its typically insidious and gradual manner, the individual thinks that he is just getting older or getting a little overweight, can't run as fast as he used to, or gets out of breath more easily than he used to; and attributes it to factors such as the ones I mentioned. A little later on, the person begins to notice that in fact, he or she can't do the things that many other people the same age can do.* * * Eventually, in the very severe cases, a person's life consists of sitting in an armchair on the ground floor with an oxygen tank, and disconnecting it just long enough to get up and go to the bathroom.
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> 51 Fed. Reg. 22612, 22622 (1986).

it more likely than it otherwise would be that a particular plaintiff who has been exposed to asbestos will eventually develop cancer."

Nor is that logical relationship insubstantial. As previously described (pp. 3-4, *supra*), 10 percent of individuals with asbestosis contract mesothelioma (cancer of the lining of the lung); 39 percent of those with asbestosis who also smoke contract fatal lung cancer, while the rate for nonsmokers with asbestosis is 2-5 percent, which is still a substantial risk. Significantly, as petitioner's own expert agreed at trial, it is a widely held view that the increased risk of lung cancer applies only to those who have asbestosis. JA 470; p. 4 & note 2, *supra*. The asbestosis confirms the degree of lung infiltration -- "the highest kinds of exposures" (JA 95) -- as well as a person's particular adverse biologic reaction to the fibers.

The second layer of the relationship binding together respondents' asbestosis and their fear of cancer is likewise significant. It derives from the essential fact that asbestosis and the fear of cancer are both caused by petitioner's same negligent conduct, commencing with the infiltration of the respondents' lungs with asbestos fibers and extending to asbestosis. Respondents' fear of cancer is, precisely as contemplated by the *Restatement (Second) of Torts*, "an emotional disturbance resulting from *** the conduct which causes [asbestosis]." See § 456. Just as with the cases of dog bites and rabies more than a century ago, both asbestosis and cancer are caused by the same negligent conduct and respondents seek recovery only for damages based on fear and not for the cancer itself.[11]

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[11] Significantly, the relationship between asbestosis and fear of cancer clearly satisfies even petitioner's own test of the necessary corroboration of mental injury, as described in the petition for a writ of certiorari. As set forth in the "Questions Presented" of its petition, petitioner did *not* present the issue as whether emotional injury based on fear of cancer must be proved by physical manifestations. The petition was instead carefully written in the disjunctive, expressly allowing for the possibility of *"other corroboration of injury related to their alleged fear of cancer."* Pet. i (emphasis supplied). Proof of asbestosis, however, supplies just that corroboration which petitioner acknowledged would be sufficient. It is undeniably both "injury" and it is "related" to the "fear of cancer." The evidence of asbestosis, furthermore, is itself corroborated by the very type of "objective medical evidence" upon which petitioner insists: a detailed expert medical diagnosis. Perhaps that is why petitioner sought, upon further reflection, to rewrite the question presented in its subsequent brief on the merits. *Compare* Pet. i *with* Pet. Br. i. Such a rewrite would seem to implicate the Court's rules, which allow for the "Question Presented" to be reworded, but do not allow the petitioner to "change the substance of the questions already presented." S.Ct Rule 24.1(a). But, in all events, petitioner's effort to revise the question presented is strikingly revealing of the fundamental weakness of its legal position. The judge's instruction to the jury in this case is entirely consistent with petitioner's original question. *Compare* JA 573 *with* Pet. i.

2. Petitioner and its amici are also mistaken that reasonable fear of cancer is not recoverable because "asbestosis and cancer are separate diseases." Pet. Br. 15-16; U.S. Amicus Br. 5, 11-13. Respondents did not seek and the trial judge did not permit the jury to award any damages based on cancer itself. See JA 573. The "'separate disease'" rule cited by the United States (Br. 12) is therefore neither implicated in this case nor inconsistent with the recovery of damages based on fear of cancer.

The "separate disease" rule originated in cases in which tort defendants, relying on "the well-established rule that a claim or cause of action may not be split," were arguing for "a judge-made rule that upon manifestation of any harm, the injured party must then, if ever, sue for all harms the same exposure may (or may not) occasion some time in the future." Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117, 119 (D.C. Cir. 1982) (Ginsburg, J.). As proposed by the tort defendants in those earlier cases, a victim of asbestosis would have to sue for both asbestosis and for unrealized cancer at the same (earlier) time and would be able to obtain relief for the latter only if he could prove that he was then "reasonably certain" to get cancer. *Id.* at 120. The unfairness of requiring a plaintiff to bring a suit, if ever, when the evidence would invariably be insufficient is what prompted many courts to adopt the "separate disease" rule, which allows for the statute of limitations to run for each disease separately. *Id.* at 120-21.

In this case, however, respondents are not claiming damages for cancer. JA 573. They are instead seeking damages not for

a future physical injury, but for their *present* mental injury, which exists whether or not that future physical injury occurs. The United States is correct that FELA's "text clearly focuses on present injuries" (Br. 15), but equal wrong in characterizing respondents' mental injury as not "present." Respondent's "fear is happening now." Beeman v. Manville Corp., 496 N.W.2d 247, 252 (Iowa 1993).

Unlike either petitioner or the United States, the trial judge in this case correctly distinguished between the reasonable apprehension of future consequences and the consequences themselves, allowing recovery only for the former. JA 573. It is the same distinction evident in the rabies cases discussed above. It is also, of course, the same distinction that defines the essential difference between the independent torts of assault (apprehension of a harmful contact) and battery (harmful contact). Restatement (Second) Torts, §§ 13, 18, 21.

No inconsistency is presented between the "separate disease" rule and distinguishing between present and future injury. Many of the jurisdictions adopting that rule have also allowed plaintiffs with asbestosis to recover damages for fear of cancer in their asbestosis claims. See, *e.g.*, Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 521, 528 (Fla. Dist. Ct. App. 1986); Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 563, 567 (1985); Griffin v. Keene Corp., 1990 U.S. Dist. Lexis 7424, slip op. 4 (N.D. Ill. 1990). Those courts all recognize that the present injury based on reasonable fear is distinct from the future consequences of cancer and presents no more a problem of double recovery than does recovery for both assault and battery. These judicial rulings also avoid the unfairness that would otherwise result because many current victims of asbestosis would be unlikely ever to be made whole for their present mental injuries, such as those victims who die of asbestosis or other causes before cancer occurs or a lawsuit can be brought. Most persons die of mesothelioma within 12 months of its diagnosis. See H. Corwin Hinshaw & John F. Murray, *Diseases of the Chest* 731-32 (4th ed. 1980).

3. Although this Court did not rule in *Metro-North* on the precise question, the Court's opinion left little doubt that a

plaintiff with asbestosis could recover damages for reasonable fear of cancer under FELA. The Court held that FELA "permits 'recovery of emotional injury' by 'those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct." 521 U.S. at 430, *quoting*, Gottshall, 512 U.S. at 547-48. The Court also made clear that under settled tort doctrine, a disease such as asbestosis would satisfy the threshold physical injury requirement. The Court both described how "[c]ommon law courts do permit a plaintiff who suffers from *a disease* to recover for negligently caused emotional distress" (521 U.S. at 432 (emphasis supplied)) and affirmatively ruled that a railroad employee "cannot recover unless, and until, he manifests symptoms of *a disease*" (*id.* at 436 (emphasis supplied)). The *Metro-North* opinion even cites favorably to the lower court's ruling in *Lavelle v. Owens-Corning Fiberglass Corp.*, 30 Ohio Misc. 2d 11 (Ct. Common Pleas, Cayahoga Cty. 1987), which this Court described as allowing recovery for fear of cancer because the "emotional distress damages [were] sought by an *asbestosis-afflicted plaintiff*." 521 U.S. at 437 (emphasis supplied).

Indeed, unlike in this case, the railroad petitioner in *Metro-North* and the same amici who support petitioner in this case, made quite clear in the legal briefs that they filed in *Metro-North* that an asbestosis-afflicted plaintiff *would* be able to recover for reasonable fear of cancer as part of his overall damages.[12] The American Insurance Association (AIA), amicus both in *Metro-North* and here, made explicit its promise to future asbestosis-inflicted plaintiffs. The AIA declared in its *Metro North* amicus brief (*Metro North* AIA Amicus Br. 14) that "[t]he question here is not *whether* respondent can sue, but *when*. There is no doubt that if respondent does, in fact, suffer a physical injury from exposure to asbestos, he will be able to bring a cause of action to recover not only for his physical injuries, but also for *any* emotional injury" (emphasis in original and supplied).[13]

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[12] See, *e.g.*, *Metro-North* Pet. Rep. Br. 18 ("Indeed, if plaintiff's medical records contained any objectively verifiable functional impairment, he would have an old-fashioned personal injury claim, and there would be no need to talk about a zone of danger test, physical impact, or the like.").

[13] In strikingly similar language and identical emphasis, the United

Such acknowledgments were hardly surprising in *Metro-North* because of the clarity of settled tort law. What is surprising is how the petitioner railroad in this case and the same amicus now claim otherwise. As correctly described by the petitioner railroad in its *Metro-North* brief (Br. 20 & n.12), the "better rule in asbestos cases" is the one "adopted by the overwhelming majority of courts, namely to restrict recovery for emotional distress to plaintiffs with actual physical injury caused by asbestos exposure." The lower courts have, in fact, routinely upheld jury instructions that allow a jury to include damages based on reasonable fear of cancer where, as in this case, "the exposure to asbestos * * * has already actually resulted in some physical harm" such as asbestosis. Dobbs, The Law Of Torts, *supra*, 844 & n. 5, *citing* Eagle-Picher Industries v. Cox, 481 So.2d 517 (Fla. Dist. Ct. App. 1985); see, *e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 413-415 (5th Cir.1986) (en banc); Griffin v. Keene Corp., 1990 U.S. Dist. Lexis 7424, slip op. 4 (N.D. Ill. 1990); Beeman v. Manville Corp., 496 N.W.2d 247, 251-53 (Iowa 1993); Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 194 (Ky. 1994); Hoerner v. ANCO Insulations, Inc., 812 So.2d 45, 77 (La. Ct. App. 2002); Denton v. Southern Railway Co., 854 S.W. 2d 885, 888-89 (Tenn. Ct. App. 1993).

4. Finally, there is nothing about the jury verdict in this case to support the Chamber of Commerce's suggestion (Br. 3) that respondents' asbestosis was merely a pretext for a damage award almost exclusively based on fear of cancer. There is instead every reason to presume the opposite. The trial evidence established the serious impairments caused by respondents' asbestosis, ranging from their major physical impact on daily life activities - walking short distances, talking, singing - to the sheer terror caused by being unable to breath because of progressively worsening shortness of breath. See,

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States asserts in this case that "the question is not *whether* damages for fear of cancer may be recovered, but *when*." U.S. Amicus Br. 5 (emphasis in original). The answer to that question, however, is provided in the *Metro-North* brief from which the question apparently originated: when "the respondent does, in fact suffer a physical injury from exposure to asbestos." AIA *Metro-North* Br. 14.

e.g., JA 114 ("shortness of breath" means "just can't breath[e]"); pp. 6-7, *supra*. No one testified, nor did their trial counsel argue to the jury, that fear of cancer was the most significant of their injuries. One respondent stated that his greatest source of anxiety was not cancer but his worsening "shortness of breath" by causing him to "clos[e] out more and more every day. * * * The only thing I know is pray * * *." JA 299.

Because, moreover, petitioner neither sought nor obtained a special jury verdict that separated out the damages attributable to fear of cancer from respondents' other injuries, there is no way of knowing whether any respondent received significant, or even any, damages on that ground. Nor can petitioner now fairly pierce the verdict and presume otherwise. A general jury verdict on appellate review is entitled to a virtually irrebutable presumption of regularity as to how the jury allocated damages between a plaintiff's various injuries. A defendant cannot prevail on appeal by arguing that the jury might have awarded all of the damages for one of a plaintiff's injuries and none for any of the others. *Cf.* Gallick v. Baltimore & O.R. Co., 372 U.S. 108, 119 (1963) ("it is the duty of the courts to attempt to harmonize the [jury] answers, if it is possible under a fair reading of them"). In sum, even if, as petitioner argues, the evidence did not support awarding large sums for respondents' fear of cancer, there is no reason to presume that the jury did so.

C. None Of Petitioner's Various Arguments Is Relevant To The Question Whether A Railroad Employee Suffering From Asbestosis May Recover Under FELA For Fear of Cancer Based On Such Asbestosis

Petitioner and its amici dedicate volumes to legal issues not presented by the facts and procedural posture of this case. They contend that a plaintiff should not be able to maintain a claim for negligent infliction of emotional distress unless the emotional distress is sufficiently "severe" to be corroborated by "physical manifestations." They argue, more particularly, that such emotional distress claims based on fear of cancer should be subject to especially rigorous scrutiny because of the background risks of cancer everyone faces. And petitioners and

its amici contend that the nation faces an asbestos litigation "crisis" that warrants the judiciary's guarding against any expansion of tort remedies to those with apprehensions of future physical injuries. See, *e.g.*, Pet. Br. 16-31.

The short answer to all these contentions is that unlike the railroad employees in *Metro-North*, respondents here are *not* maintaining a stand-alone claim for negligent infliction of emotional distress. They were not merely exposed to asbestos; they were not mere bystanders to the physical injury of others; and they are not complaining of some incidental, trivial physical impact with only a tangential relationship to their principal injury. Respondents are not physically unimpaired plaintiffs. Consistent with the trial judge's instructions (JA 573), respondents are instead claiming the right to recover damages for mental injuries as an element of *damages* for a tort otherwise established that caused physical injury.

Petitioner's basic error lies in its confusing two distinct legal categories for the recovery of mental injuries: (1) Where mental injuries are simply an additional aspect of damages for a tort cause of action otherwise established (sometimes referred to as "parasitic" damages); and (2) Where no physical injury occurred and the mental injuries themselves purport to satisfy the injury element necessary to establish the *prima facie* case necessary for tort recovery. See generally William L. Prosser, *Handbook of the Law of Torts* 213 (1941); Thomas A. Street, I *The Foundations of Legal Liability – Theory and Principles of Tort*, 460 (1906); Restatement (Second) of Torts, Ch. 2, Intro. Note, p. 23; *id.* at § 924(a) & comment (a). This case implicates the first legal category. Because, moreover, all of the legal authorities and policy arguments vigorously asserted by petitioner and its amici presuppose application of the second category, they are erected on a foundational mischaracterization of the case at hand. And, like a house of cards, petitioner's entire argument utterly collapses upon removal of that single, fictional card.

1. Petitioner devotes most of its brief (Br. 16-31) to the proposition that the common law requires physical manifestations of severe mental injury. The legal precedent and authorities upon which petitioner principally relies, however, are all cases in which the petitioner is maintaining a stand-alone

claim for recovery of emotional distress either intentionally or negligently inflicted. Many are bystander cases. None is relevant to this case.[14]

We do not deny that *for stand-alone emotional distress claims* there is precedent providing that the mental injury element necessary for liability must be "severe" and sometimes even established by physical manifestations.[15] This precedent includes claims for negligent infliction of emotional distress for persons not physically impacted or injured but only a bystander within the "zone of danger." But *no* comparable substantial precedent exists for instances where the plaintiff is not seeking

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[14] *Jones v. CSX Transportation*, 287 F.3d 1341 (11th Cir. 2002) is completely out of step with both traditional tort law and the vast majority of judicial rulings addressing whether victims of asbestosis can also recover for their reasonable fear of cancer. The court erred by completely rejecting the longstanding and established distinction between stand-alone claims for negligent infliction of emotional distress and recovery of damages for mental injury "simply as an element of damages in an ordinary negligence action." *Id.* at 1348.

[15] The result in this case, however, would not change even if, contrary to our submission, the relationship of respondents' mental injury to their physical injury (asbestosis) was not deemed sufficient to make this a parasitic damages claim. Although some courts imposed additional limits on the recovery of mental injury when they expanded recovery to plaintiffs in the "zone of danger" but lacking physical impact and injury, those precedents do not intimate an intention simultaneously to contract recovery where, as here, such an impact and injury are both present. As this Court has itself noted, moreover, the precedent is not nearly as one-sided as petitioner suggests, and not all jurisdictions are so insistent on such proof of physical manifestations even for stand-alone claims of negligent infliction of emotional distress. See Gottschall, 512 U.S. at 549 n.11; see, *e.g.*, Taylor v. Baptist Medical Center, 400 So.2d 369 (Ala. 1981); Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916 (1980); Leong v. Takasaki, 55 Haw. 398 (1974); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Versland v. Caron Transport, 206 Mont. 313 (1983); Burd v. Sinn, 486 Pa. 146 (1979). In all events, whether formally recovered as "parasitic" damages or on the basis of a "stand-alone" tort, the policy reasons for imposing the physical manifestation requirement (the only issue raised by the question presented) on mental injury are not present in this case where respondents are suffering from asbestosis.

recovery of mental injury on a stand-alone basis for negligent infliction of emotional distress. Quite the opposite is true. The reasons for requiring greater degrees of proof for stand-alone claims for mental injury are simply not present, which is why it would be "absurd[to] apply[] the bystander rule to a case where the direct victim is seeking recovery for emotional distress which is reasonably related to a physical injury." McAdams v. Eli Lilly, 638 F.Supp. 1173, 1178 (N.D. Ill. 1986).

As described by this Court in *Metro-North*, the common law "does not examine the genuineness of emotional harm case by case." 521 U.S. at 436. There is consequently no rule of tort law generally applicable to mental injuries that makes such injuries recoverable only if they are "severe" and are "physically manifested." Courts have instead decided that whether a form of "emotional distress" is recoverable should turn on whether "the distress falls within specific categories." *Id.* at 429. The limitations that apply to the recovery of mental injuries vary widely between categories.[16] What is entirely absent from tort law's categorical approach is any support for petitioner's claim that there are universally applicable requirements that mental injuries, including emotional distress, are recoverable only if they are severe and physically manifested.

Even more significantly, the *Metro-North* Court expressly identified respondents' circumstances as one such "category" of plaintiffs that is entitled to recovery for mental injury: "that category of plaintiffs who suffer from a disease" caused by the

[16] For some of those categories, there are courts that require that the mental injury be severe, such as for intentional infliction of emotional distress in general (see Restatement (Second) Torts, § 46), and some even further require that the emotional distress result in "bodily harm" (*id.* § 46 (2)(b) (where tortious conduct directed at third party who is not a member of the plaintiff's immediate family)). But such categorical rules are context-specific and without general applicability. For example, false imprisonment (*id.* § 35), assault (§ 21), or offensive battery (§ 18) are all torts where, unlike this case, the mental injury provides the injury element necessary to establish the tort in the first instance, but no such severity or physical manifestations requirement applies to any of those torts. See, *e.g.*, *id.* § 21 comment c ("It is not necessary that [the assault] should directly or indirectly cause any tangible and material harm").

defendant's negligent conduct. 521 U.S. at 436. The reasons the Court offered for that categorical rule are those which justify full recovery where, as in this case, the plaintiff has otherwise established his tort based on physical injury and merely seeks to recover for "related" mental injury (*id.*) as "parasitic damages": "a desire to make a physically injured victim whole or because the parties are likely to be in court in any event" (*id.* at 436-37). Because of their asbestosis, respondents are just those "physically injured victim[s]" who will "be in court in any event" and are therefore entitled to be made "whole" for all their injuries caused by petitioner's negligence.

Tort law's categorical approach to the recovery of mental injuries is also why petitioner is mistaken in relying (Br. 28-30) on any of the "general policy reasons" previously identified by this Court for why courts have restricted recovery of mental injury. See Metro-North, 521 U.S. at 433. The very reason for the categorical approach is to address those policy concerns by substantially limiting the number of potentially valid plaintiffs. Hence, where, as in this case, the plaintiff fits in a traditional tort category because he is suffering from a physical disease, the category has itself already "separat[ed] valid, important claims from those that are invalid or 'trivial.'" *Id.* Likewise dissipated by the categorical bounds is the "threat of 'unlimited and unpredictable liability,'" or "the 'potential for a flood' or comparatively unimportant, or 'trivial,' claims." *Id.*

It is especially noteworthy in this respect that the categorical requirement that a plaintiff suffers from a physical disease such as "asbestosis" does in fact dramatically limit the number of potential plaintiffs who can maintain a valid cause of action. At trial, it was established that only a small percentage of those exposed to asbestos suffer from the intensity of lung scarring and pulmonary impairment necessary for a diagnosis of asbestosis. JA 95-96, 211.[17] Petitioner in this case is

[17] Petitioner acknowledges this essential fact, but fails to account for its significance. See Br. 22 n.16 , *quoting* In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1570 (D. Haw. 1990) ("'of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment.'"). During the *Metro-North* oral argument, the railroad

consequently hard pressed to claim that allowing asbestosis plaintiffs to recover for all their injuries according to traditional tort law will unduly open the litigation floodgates.

2. Equally lacking in merit is petitioner's assertion (Br. 21-25) that fear of cancer is *per se* unreasonable. According to petitioner, such "knowledge-based fears" are too "inherently subjective" and, "[e]specially when measured against the high background risks every individual faces, * * * not the kind of information that reasonably causes severe emotional injury to the normally constituted person." *Id.* at 12, 21-22, 24.

Petitioner's error is two-fold. First, petitioner's argument is premised on the same false notion that infects its entire brief, which is that the mental injury must be "severe" to warrant recovery. As previously described, no such severity requirement generally applies where, as here, the plaintiffs are not asserting a stand-alone claim for mental injury.

Petitioner's second error, however, is even more fundamental. Stripped of its exaggerated rhetoric, petitioner's attack on what it dubs "knowledge-based fears" is little more than a thinly-guised effort to challenge the sufficiency of the evidence. Because any fear is necessarily based on personal "knowledge," petitioner's indictment must be that the information upon which respondents' fear was based in this case was insufficient to sustain any jury award. Petitioner supports its argument by citing to a series of miscellaneous articles (Br. 22-24 & nn.17-21) that discuss asbestos exposure (not asbestosis) and mesothelioma or lung cancer.

We could easily respond to this argument by lengthy discussion of substantial competing scientific authority concerned with asbestosis and not just asbestos exposure,[18] but the proper course is instead to rely on the factual record actually produced in the trial court. As previously described,

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counsel was similarly clear, advising the Court that "it is undisputed that the overwhelming majority of exposure-only plaintiffs will never develop asbestos-related injuries." *Metro-North* Oral Arg. Trans. 14-15.

[18] *E.g.*, Churg & Green, *Pathology of Occupational Lung Disease, supra*; Browne, *Is Asbestos or Asbestosis the Cause of the Increased Risk of Lung Cancer in Asbestos Workers?, supra.*

that trial evidence, which included the introduction of scientific studies subject to cross examination, was more than sufficient to establish the reasonableness of respondents' fear of cancer based on asbestosis. See pp. 3-4, 7, *supra*. A reasonable person would not have to view a 10 percent risk of mesothelioma, or a 39 percent risk of fatal lung cancer for smokers as "trivial," "small," or "incremental. " Pet. Br. 25, 30.

What petitioner plainly cannot now do is either introduce new evidence or invite this Court to reweigh the evidence. Petitioner had ample opportunity at trial to introduce evidence that an asbestosis victim cannot reasonably apprehend cancer. Petitioner cannot now supplement the trial record without improperly invading the jury's factfinding responsibilities and the supervisory authority of the trial judge. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions * * *." Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 (1944). Nor is it a fair objection "to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute * * * a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute." Lavender v. Kurn, 327 U.S. 645, 653 (1946). This Court, moreover, has long made especially clear the impropriety of challenges to the *amount* of jury awards in FELA cases.[19]

3. Finally, petitioner's assertion that respondents should be

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[19] For instance, the Court in *St. Louis I. M. & S.R. Co. v. Craft*, 237 U.S. 648, 661 (1915) readily dismissed a claim "that the award of $5,000 as damages for pain and suffering" was "excessive." While acknowledging that "[t]he award does seem large," the Court ruled that "the power, and with it the duty and responsibility, of dealing with this matter rested upon the courts below. It involves only a question of fact and is not open to reconsideration here." *Id.* (citations omitted). Petitioner's implicit challenge to the amount of the jury award in this case is even thinner. The railroad defendant in *Craft* at least knew that the plaintiff had been awarded a substantial sum: $5,000 in 1915. Notwithstanding its reference (Br. 2, 6) to "staggering recoveries" and "massive verdicts," petitioner can make no such comparable claim with regard to the jury's assessment of damages for respondents' fear of cancer. Here, the record does not reveal how much, if any, damages the jury awarded based on such fear.

denied any recovery for their reasonable fear of cancer because the nation faces an asbestos litigation "crisis" is no more persuasive. As described in the very documents upon which petitioner relies, those who claim that a crisis exists focus on the litigation burden presented by thousands of lawsuits filed by so-called "exposure only" plaintiffs -- those who have been exposed to asbestos, but do not suffer from any physical disease or impairment as a result. They contend that this litigation threatens to overwhelm the courts and thereby deny judicial relief to those deserving victims who are actually suffering from a physical disease. They single out victims of asbestosis as examples of those "clearly entitled to compensation." See James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, reproduced in Pet. Lodging, p. 27. Respondents, however, represent the very victims of asbestosis - the "individuals who actually have asbestos-related illnesses" - routinely acknowledged as legitimate plaintiffs. See, *e.g.*, Chamber of Commerce Amicus Br. 2.

The policy arguments advanced by petitioner and its amici are further misdirected because neither this Court nor FELA is the proper avenue for securing the law reform they seek. If current tort law is incapable of addressing the claims brought by thousands negligently exposed to asbestos, then it is for Congress and state legislatures, and not this Court, to change the applicable law.[20] FELA would, in all events, be an

[20] Congress has, in fact, been considering legislative action to reform tort law and related civil procedural matters for the past several years in response to the challenges presented by mounting asbestos litigation. See, *e.g.*, S. 2546, Fairness in Asbestos Compensation Act of 1998, 105th Cong. 2d Sess. (1998); H.R. 1283, Fairness in Asbestos Compensation Act of 1999, 106th Cong. 1st Sess. (1999). Notably, in those legislative proceedings, those supporting petitioner in this case freely admitted that legislative, rather than judicial, action was the only legitimate avenue for addressing the complex issues. See, *e.g.*, *Fairness in Asbestos Compensation Act of 1999*, Hearing Before the House Committee on the Judiciary, 106th Cong., 1st Sess. 320 (1999) (testimony of Conrad Mallet, Jr., Chairman, Coalition for Asbestos Reform) ("resolution of the [asbestos litigation] dilemma lies not with the judiciary, but with Congress"); 145 Cong. Rec. S3510 (March 25, 1999) (statement of Senator John Ashcroft) ("Judges who make legal rules out of whole cloth in the absence of constitutional or statutory text damage the standing of the judiciary and our constitutional structure. * * * [A] legislative solution to th[e asbestos] problem * * * provides the proper incentives for courts to be restrained and reinforces the proper roles of Congress and the Judiciary.").

especially inappropriate vehicle for the kind of tort reforms sought by petitioner and its amici. Not only does FELA play only a peripheral role in asbestos litigation, but as long emphasized by this Court, FELA is a "broad remedial statute" and its statutory language must be interpreted "'liberally' in light of its humanitarian purposes." Atchison T. & S.F.R. Co. v. Buell, 480 U.S. 557, 562 (1987); Metro-North, 521 U.S. at 429, *quoting*, Gottshall, 512 U.S. at 543. As described by the Court decades ago in rejecting a similar effort to limit FELA's deliberate expansion of railroad employee recovery, "[i]n the face of the legislative policy embodied in [FELA] * * * considerations of public policy of the general kind relied upon * * * cannot be permitted to encroach further upon the special policy expressed by Congress in the Act." Still v. Norfolk & W. R. Co., 368 U.S. 35, 44-45 (1961).

II. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY TO APPORTION RESPONDENTS' DAMAGES BETWEEN PETITIONER AND ABSENT THIRD PARTIES

Petitioner argues that the trial judge should have instructed the jury to apportion damages to various absent third parties that petitioner alleges are partially responsible for respondents' injuries. Petitioner's initial argument (Br. 32-42) is that apportionment was warranted because respondents' injuries were "divisible" based on causation. Petitioner's alternative proffer (Br. 42-47) is that even if causation does not provide a basis for apportionment, the Court should now devise for FELA a new, unspecified scheme of comparative fault for apportionment. Both arguments should be rejected.[21]

[21] Petitioner's apportionment arguments pertain at most only to

A. **FELA Provides That A Railroad Employee Can Recover In Full From The Railroad For Injuries Caused "In Whole Or In Part" By The Railroad's Negligence**

1. Contrary to petitioner's submission (Br. 32-35), FELA's "simple and direct" language establishes a "relaxed standard of causation" that compels rejection of petitioner's proposed "relaxed" apportionment standard. Coray v. Southern Pac. Co., 335 U.S. 520, 524 (1949); Gottshall, 512 U.S. at 543. FELA unambiguously answers the question whether a railroad employer is liable for an employee's personal injuries for which the railroad's negligent conduct was only a partial cause. According to the express terms of the statute, a railroad "shall be liable in damages" to the injured employee "for such injury or death resulting *in whole or in part* from the negligence" of the railroad. 45 U.S.C. § 51 (emphasis supplied). It is therefore well settled that it is neither a complete nor a partial defense to an employee's lawsuit for complete recovery that the employee's injuries were "caused jointly by the fault of the carrier and third persons." See, *e.g.*, Gaulden v. Burlington Northern, Inc., 654 P.2d 383, 391(D. Kan. 1983) ("bear all of the loss").

This Court's own decisions are fully in accord. In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957), this Court reversed a state court ruling that had construed FELA to impose a test of causation under which the railroad defendant's negligence had to be "the sole, efficient, producing cause of injury." Emphasizing the "in whole or in part" language, the Court held that causation is established when "the proofs justify with reason the conclusion that employer negligence

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respondents Ayer and Butler because only for those two did petitioner argue below that there was evidence of asbestos exposure at nonrailroad workplaces. See JA 647; note 3, *supra*. Petitioner did not assert asbestos manufacturers liability in its proposed jury instruction or verdict form and declined to put on evidence as to their culpability. JA 539, 550-60; pp. 7-8, *supra*. Petitioner's oblique references (Br. 8, 49) to respondent Spangler's 2 years of service on a Navy submarine fall far short of the minimum for apportionment, no matter what the legal standard, given the lack of any evidence concerning the extent or nature of his asbestos exposure there.

played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* (emphasis supplied). See, *e.g.*, Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 109 (1959); Urie v. Thompson, 337 U.S. 163, 187 (1949).

To be sure, the Court in *Rogers* did not elaborate on the precise scope of damages recoverable by an employee when the railroad's negligence "played any part" in causing the injury, and there was also a contributing third party cause. 352 U.S. at 507. But there is no merit to petitioner's suggestion that the *Rogers'* ruling does not bear on that question. The *Rogers* Court described as "drastic" the employer's duty to pay damages for injury "due 'in whole or in part' to its negligence." *Id.* The Court characterized FELA as having "stripped [an employer] of his common law defenses" to such a degree that "for practical purposes the inquiry in these cases today rarely presents more than the single question whether the negligence of the employer played any part, however small, in the injury * * *." *Id.* at 507-08. Finally, the Court deemed as wholly "irrelevant" "whether the immediate reason" for the injury was "some cause not identified by the evidence." *Id.* at 503.

Hence, in *Lillie v. Thompson*, 332 U.S. 459, 461-62 (1947), the Court similarly described as "irrelevant" even "[t]hat the foreseeable danger was from intentional or criminal misconduct." The railroad "nonetheless had a duty to make reasonable provision against it" and "[b]reach of that duty would be negligence." *Id.* Rejecting the railroad's defense, the Court held that "we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence." *Id.*

Under petitioner's view by contrast, apportionment would be required whenever an injury is "caused by successive independent causes" (Br. 32) and the existence of a contributing cause would be highly "relevant" whether intentional, criminal, negligent, or even nonnegligent in nature. FELA litigation would regularly rather than "rarely" present more than the "single question" whether the employer's negligence played "any part." FELA litigation would become encumbered by the far more complex, nonbinary inquiry of the precise percentage of the employer's causal contribution to the injury. In short,

injected into FELA would be the very kind of limitation on liability that Congress intended to eliminate by rejecting the assumption of risk and fellow servant rule defenses and by making employers liable for injuries they caused "in part."

Finally, petitioner's radical reading of FELA is contradicted by the virtual absence in almost a century of FELA litigation of any indication in either the judicial precedent or the litigation practices of railroads that a railroad's liability to a plaintiff must be reduced in inverse proportion to its causal contribution. Not once in this Court's many decisions reaffirming the specialized and liberal nature of FELA's "in whole or in part" causation language has the Court even hinted at the existence of such a major limitation on defendant liability. Instead, the federal and state reporters are replete with contribution cases brought by FELA defendants under state law. See Annot., *Right of Railroad Charged with Liability for Injury to or Death of Employee Under Federal Employer's Liability Act, to Claim Indemnity or Contribution from Other Tortfeasors*, 19 A.L.R. 3d 928 (1968).[22] Those cases arose because those railroad defendants were entirely liable under FELA and sought to recover part of the damages by suing a third party that jointly caused the injuries.[23]

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[22] See, *e.g.*, Mills v. River Terminal Ry. Co., 276 F.3d 222, 222 (6th Cir. 2002); Gaines v. Illinois Central Ry. Co., 23 F.3d 1170, 1171 (7th Cir. 1994); Ellison v. Shell Oil Co., 882 F.2d 349, 353-54 (9th Cir. 1989); Ala. Great. S. R.R. v. Chi. & Northwestern Ry., 493 F.2d 979, 983 (8th Cir. 1974); Kennedy v. Penn. R. Co., 282 F.2d 705, 710 (3d Cir. 1960); Southern R. Co. v. Foote Mineral Co., 384 F.2d 224, 226 (6th Cir. 1967); Fort Worth & Denver Ry. v. Threadgill, 228 F.2d 307, 312 (5th Cir. 1955); Patterson v. Penn. R. Co., 197 F.2d 252, 253 (2d Cir. 1952); Stephens v. S. Pac. Transp. Co., 991 F. Supp. 618, 620 (S.D. Tex. 1998); Tucker v. Reading Co., 335 F. Supp. 1269, 1271 (E.D. Pa. 1971); Reynolds v. Southern Ry. Co., 320 F. Supp. 1141, 1142-43 (N.D. Ga. 1969); Spielman v. New York, New Haven & Hartford R. Co., 147 F. Supp. 451, 453-54 (E.D.N.Y. 1956); Engvall v. Soo Line R., 632 N.W.2d 560, 569 (Minn. 2001); Freeman v. Norfolk S. Ry. Co., Inc., 714 So.2d 832, 835 (La. App. 1998); Walter v. Dow Chem. Co., 195 N.W.2d 323, 324-25 (Mich. App. 1972); Gulf, Mobile & Ohio R. v. Arthur Dixon Transfer Co., 98 N.E.2d 783, 785-86 (Ill. App. 1951); Seaboard Air Line Ry. v. American Dist. Elec. Prot. Co. 143 So. 316, 317 (Fla. 1932).

[23] Petitioner properly relegates to a footnote (Br. 33 n.26) *Dale v.*

2. Petitioner and its amici seek to overcome FELA's plain meaning by relying on two other statutory clauses that they contend mandate apportionment of damages between joint causes. Petitioner's reliance on both clauses is misguided.

a. According to petitioner (Br. 32-33 n.26) and amicus Coalition for Asbestos Justice (Br. 24-27) FELA's adoption of comparative fault for plaintiff's negligence (45 U.S.C. § 53) demonstrates congressional intent in favor of apportionment in this case. Rather than support petitioner's view, however, this Court has previously made clear that the fact that Congress took such an explicit step reinforces the opposing view that Congress intended no similar reduction in plaintiff recovery on account of the joint liability of nonrailroad third parties. While 45 U.S.C. § 53 provides that when the employee's own negligence causes his injury, "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," no comparable provision exists with regard to third party causes. As this Court pointedly explained in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 268 n.23 (1979), "[i]t would be particularly curious for Congress to refer expressly to the established principle of comparative negligence, *yet say not a word* about adopting a new rule limiting the liability of the [defendant] on the basis of the nonparty employer's negligence" (emphasis supplied). Hence, both the "in part" causation standard and comparative negligence standard set forth in 45 U.S.C. §§ 51, 53 affirmatively reinforce the full scope of railroad liability.

Nor is there any merit to the suggestion of petitioner and its amicus that FELA's imposition of complete liability on a railroad is inconsistent with FELA's adoption of comparative fault for plaintiff's negligence. FELA adopted a comparative

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Baltimore & Ohio R.Co., 552 A.2d 1037, 1041 (Pa. 1989), which served as the centerpiece of its petition (pp. 20-21) and reply (pp. 6-7). The *Dale* court found "implicit" in FELA a reduction in damages for third party causes, somehow based on FELA's treatment of contributory negligence and the *Rogers* decision. 552 A.2d at 1041. We think that the reasoning of the *Dale* dissenters (*id.* at 1043-44 (Papadakos, J., joined by Larsen, JJ), which is consistent with the overwhelming precedent, is more persuasive.

fault approach in order *to expand* an employee's ability to recover by eliminating the contributory negligence defense that otherwise would have barred recovery altogether. Petitioner's proffered apportionment standard, by contrast, would *limit* employee recovery by placing the burden on the employee, rather than on the railroad employer, to establish the liability of other third parties and to assume the risk that those other third parties are judgment proof. Indeed, because petitioner contends that its liability must be reduced if there are other contributing *nonnegligent* causes (Br. 36), unlike even the rule for comparative fault, petitioner's unprecedented theory of limited defendant liability would virtually guarantee that plaintiffs would be denied full recovery for their injuries.

Accordingly, because comparative fault and joint and several liability were both intended to expand employee recovery, they reinforce rather than oppose each other. It is therefore not at all surprising that many federal and state liability schemes combine the two approaches, thereby directly contradicting petitioner's claim of their fundamental incompatibility. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 220 (1994); Edmonds, 443 U.S. at 260-61 & n.7; Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1123, 1129 (5th Cir. 1995) (en banc); Dobbs, *supra*, at 1086 & n.2; Jerome H. Nates, *Damages in Tort Actions*, § 48.03[6] (1993 & 1997 Supp.).

b. Equally without merit is petitioner's claim (Br. 32) that FELA "makes clear that railroads are not liable for employee injuries that result from outside causes" because 45 U.S.C. § 51 provides that railroads are liable only "to any person suffering injury *while* he is employed by such carrier." The single word "while" has no bearing on the joint causation issue.

First, petitioner's unfortunate phrasing "result from outside causes," obscures the vital distinction between (1) the scope of railroad liability for injuries that result *exclusively* from "outside" or nonrailroad causes; and (2) the scope of railroad liability for injuries that result from a combination of railroad and "outside" causes. Under the first scenario, the railroad is plainly not liable. A railroad must be a legal cause of the injury to be liable. But the apportionment question raised in this case concerns only the second scenario, and it is equally plain that

the "while he is employed" language upon which petitioner relies does not remotely address the distinct circumstance of joint causation. The more natural, and historically accurate, reading of the language is simply that it ensures that FELA's remedial scheme would be available to persons injured in the course of their employment with an interstate common carrier.[24]

Second, the statutory reference to "while" would have, in any event, been an especially inapt means of addressing the joint causation issue. Multiple-tortfeasor situations typically occur when the employee's injuries are caused by more or less simultaneous and concurrent railroad and nonrailroad causes. See, *e.g.*, Rogers, *supra*. The statutory language "while he is employed" offers no more guidance as to whether damages should be apportioned in that circumstance than it does if the multiple causes are not concurrent. If, moreover, petitioner is suggesting that the word "while" means that an employee is entirely barred from recovering for diseases traceable to railroad conduct, but which remain latent until long after employment has ended, this Court has already rejected such a crabbed view of FELA's remedial scope. See Urie, 337 U.S. at 187 ("We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage.").

B. Traditional And Settled Common Law Liability Rules Also Support The Trial Judge's Refusal To Instruct The Jury To Apportion Damages In This Case Between The Railroad And Absent Third Parties

The trial judge's refusals to give petitioner's proposed apportionment instruction and special verdict forms to the jury

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[24] Congress added "while he is employed" in two provisions when it reenacted FELA in 1908 in order to address the constitutional concerns this Court raised in striking down FELA's predecessor law, by ensuring that the regulated activities had sufficient nexus to interstate commerce. See 35 Stat. 65 (1908); 34 Stat. 232 (1906); 42 Cong. Rec. 4526-27 (1908) (Sen. Dolliver); The Employer's Liability Cases, 207 U.S. 463, 504 (1908).

are also consistent with the common law liability rules applicable under FELA. Petitioner misstates the role of apportionment under both traditional and evolving common law principles, which provide for the possibility of apportionment only in circumstances far narrower than petitioner suggests and not for the kind of indivisible injuries suffered by respondents.

1. To avoid FELA's plain meaning, petitioner alternatively claims (Br. 35-39) that FELA silently incorporated a common law rule allegedly prevalent in 1908 mandating apportionment of damages in multiple-cause cases. Not only would such a rule fail to overcome FELA's language and remedial purposes (Sinkler v. Missouri P.R. Co., 356 U.S. 326, 329 (1958); Rogers, 352 U.S. at 508), but petitioner's exaggerated account of the common law at the time of FELA's enactment is wrong. It is simply not true that "[s]everal liability was not only the general rule, but the overwhelming rule." Pet. Br. 35.

FELA's common law liability scheme was expressly modeled upon the "liberal interpretations * * * that now prevail in the admiralty courts of the United States" (42 Cong. Rec. 4536 (1908) (introductory statement of Senator Dolliver)), which in 1908 firmly embraced joint and several liability. See Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-155 (2d ed. 1994). As described by the Court in *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302 (1876), in which two vessels negligently collided and caused the sinking of a third vessel owned by the plaintiff, "[n]othing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them * * * and it is equally clear, that, * * * *he is entitled to judgment in either case for the full amount of his loss.*" *Id.* at 315 (emphasis supplied), *citing* Murray v. Lovejoy, 3 Wall. 19 (1863); Smith v. Hines, 2 Sumn. 348 (Me. 1836). Nor was the then-prevailing admiralty rule out of step with common law at the time. The admiralty rule favoring joint and several liability was "in accord with the common law" in "allow[ing] an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing * * *." Edmonds, 443 U.S. at 260-61 & n.7. See Pet. 22 (describing joint and several liability as "the traditional rule").

Unlike petitioner, we are willing to acknowledge that there was "considerable difference of opinion" in 1908 concerning the precise scope of joint and several liability.[25] Universal consensus, however, is not required for the application of such a standard under FELA both because joint and several liability then reflected the clear majority view and because it is the view consistent with FELA's remedial purposes and plain language. The 1906 edition of Judge Cooley's celebrated treatise on torts surveyed the case law and concluded that, notwithstanding "considerable difference in opinion," the "weight of authority" supported application of joint and several liability "where the negligences of two or more persons concur in producing a single, indivisible injury" even in the absence of any "common duty, common design or concert[ed] action." T. Cooley, *Treatise on the Law of Torts*, 247 (3d ed. 1906); Dobbs, *supra*, § 390 (same). There can be no question, moreover, regarding what standard of liability is more in harmony with FELA, even if FELA's statutory language did not already plainly impose entire liability on railroads whose negligence was at least a "part[ial]" cause of the employee's injury. A "progressive rule of liability that [i]s less restrictive * * * [is] more consistent with * * *

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[25] Because scholars in 1906 found it impossible to "harmonize all the authorities" (T. Cooley, *Treatise on the Law of Torts*, 246 (3d ed. 1906)), petitioner can find some early cases that press for a strict rule of causal apportionment in multiple tortfeasor cases. But petitioner cannot possibly maintain its claim that several liability was so "overwhelming[ly]" the rule (Br. 35) that Congress must be deemed, *sub silentio*, to have adopted it. At least one of petitioner's citations, sampled because of its illustrious author, is even wholly inapposite. Justice Holmes' opinion for the court in *Middlesex Co. v. City of Lowell*, 21 N.E. 872, 873 (Mass. 1889), arose from a bill of equity to *abate* a nuisance caused by two polluters and hence says little about the availability of joint liability in *damages actions* at common law. In 1902, the same court applied joint and several liability to independent tortfeasors who caused a single personal injury. See Corey v. Havener, 65 N.E. 69 (Mass. 1902). Because, moreover, some of those courts' preference for several liability was based on restrictions on contribution among joint tortfeasors long since abandoned, those rulings provide an especially poor historical basis for petitioner's arguments. See *Prosser & Keeton on Torts*, § 52 (5th ed. 1984).

FELA's broad remedial goals." Gottshall, 512 U.S. at 555 (adopting zone of danger test).

2. Petitioner's claim that the common law has since evolved away from joint and several liability for the kind of indivisible injuries suffered by respondents in favor of apportionment is no more persuasive. Both the *First* and *Second Restatement of Torts* confirm the pedigree and contemporary acceptance of joint and several liability for indivisible injury.

Section 879 of the *First Restatement* (1939) provides that "each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable for the entire harm, in the absence of a superseding cause." The commentary explains that "[a] person whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result." *Id.* § 879 comment a.

The *Second Restatement of Torts*, published in 1965 and 1979, is entirely in accord. Section 875 provides that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." The *Second Restatement* also makes clear that the kind of injuries being suffered by respondents in this case constitute the paradigmatic example of the kind of "indivisible harm" for which joint and several liability rather than apportionment applies. Respondents suffer from a physical disease, asbestosis, and from a variety of physical and mental impairments resulting from that disease. The *Second Restatement* commentary explains that, "[c]ertain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division" and offers as examples of such "indivisible" harms "death" and "any single wound," which fairly describes the impact of asbestosis upon the lung. *Id.* § 433A comment i ("By far the greater number of personal injuries * * * are thus normally single and indivisible.").

Relevant Restatement provisions also specifically reject petitioner's claim (Br. 36) that the common law distinguished between joint causation caused by successive and simultaneous

torts of independent actors. According to the *First Restatement*, there is liability for the entire harm "where both are simultaneously negligent * * * and also where the act of one either occurs or takes harmful effect after that of the other." § 879 comment a. The *Second Restatement* even more directly refutes petitioner's claim. Section 879 provides that where joint and several liability is otherwise applicable, "each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive."

3. Contrary to petitioner's claim (Br. 40-42), Section 433A of the *Second Restatement* does not support petitioner's view that the common law rule provides for apportionment in the kind of factual circumstances presented by this case. Section 433A provides for apportionment between multiple causes only for "divisible" injuries, which are present only if either "there are distinct harms" or "there is a reasonable basis for determining the contribution of each cause to a single harm." Respondents, however, are not suffering from distinct harms, as are presented, for instance, when a victim is suffering from a broken leg caused by one action and a broken arm caused by another. Nor are they suffering from the kind of single harm for which there could remotely exist a "reasonable basis" for determining the causal contribution. Instead, as previously described, their injuries arise from their asbestosis, which is quintessentially an "indivisible" personal injury under longstanding and contemporary tort law principles. See, *e.g.*, Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1094-96 (5th Cir. 1973) (asbestosis as indivisible injury); Owens Corning Fiberglass v. Parrish, 58 S.W.3d 467, 476-77 (Ky. 2001) (same). The accompanying *Second Restatement* commentary specifically explains that "indivisible" injury is *not* subject to apportionment and contrasts "personal injury," which is generally indivisible, from injury to real property in nuisance law, which is more susceptible to being considered divisible. Second Restatement § 433A comments d & i; see First Restatement § 881 (apportionment for nuisance).[26]

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[26] This longstanding judicial distinction between real property and personal injury in applying joint and several liability is also why

Petitioner's reliance on common law apportionment rules is, in all events, misguided because the burden is on the party seeking to "apportion" damages based on causation to establish that a reasonable basis of apportionment exists and therefore that the injury at issue is in fact divisible.[27] At trial, however, petitioner introduced hardly any evidence on the question, despite multiple opportunities. Petitioner's effort to construct a basis for apportionment for the first time now, based exclusively on sketchy testimony, is too little, too late.

The beginning and end of the evidentiary basis for petitioner's current claim that an apportionment instruction should have been given was testimony by respondents' witnesses that two of the respondents (Butler and Ayers) may have been exposed to asbestos in nonrailroad employment.[28] When respondents' medical expert was asked on direct

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petitioner is mistaken (Br. 38-39, 49) in relying on nuisance, trespass, and polluted stream cases as "analogous" to "pollution of a lung by asbestos, and the resulting asbestosis" (*id.* at 49).

[27] See Second Restatement § 433B(2) ("Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."); Third Restatement § 26 comment h ("Whether damages are divisible is a question of fact. A party alleging that damages are divisible has the burden to prove that they are divisible."); Dobbs, *supra*, § 174; Second Restatement App. §§174-423, at pp. 271-302 (1995) (listing cases); Tracy v. Cottrell, 206 W.Va. 363 (1999).

[28] The trial judge during voir dire specifically asked petitioner's counsel whether they intended to put on evidence regarding negligence and causation of third parties. JA 69-70. In the ensuing colloquy, the only third parties counsel mentioned were asbestos *manufacturers*. Petitioner's counsel at first denied any intent to introduce evidence regarding the manufacturers, but then suggested that they might. *Id.* But, in all events, petitioner never introduced such evidence (see pp. 7-8 & note 6, *supra)* and both its proposed jury instruction, verdict form, and new trial motion referred exclusively to nonrailroad employment and made no mention of manufacturers. JA 539, 550, 647-49. Thus, despite petitioner's plea (Br. 50), it long ago forfeited its opportunity to base apportionment on asbestos manufacturers. Respondents' settlements with some manufacturers were also the basis of setoffs from the final award. See p. 9, *supra*.

examination about the relative asbestos exposure to which Ayers had been subjected in his railroad job as compared to his automotive maintenance job, the doctor simply replied "Well, It's hard for me to say. I'm just going to say that they're probably equivalent." JA 205. On direct examination, the same witness testified, in addressing the relative exposure to which Butler was subjected in his three months working in the locomotive engine repair shop as compared to his thirty years as a pipefitter, that the railroad employment was a "contributing cause" and the nonrailroad employment was "a bigger contributor." JA 195. On cross examination, the witness refused to acquiesce in petitioner's counsel's characterization of the exposure during railroad employment as "very minimal" and instead said the role was "minimal" but "I don't know how much," at which point petitioner's counsel declined to allow the witness to elaborate any further. JA 236-37. In describing the contribution of nonrailroad employment to Butler's asbestos exposure, petitioner's own expert likewise acknowledged that because he "didn't take any measurements" at those locations, he could conclude only that Butler had "ample opportunity for exposure" at nonrailroad employment. " JA 376. He further conceded he could not even recall how one possible "model for attributing causation in asbestos disease" might apply. JA 392.

Such evidence establishes at most that there may have been other nonrailroad causes of the two respondents' injuries. The evidence does not remotely establish that their personal injury is divisible based on causation. The paucity of evidence is no doubt why the trial record is devoid of any argument by petitioner, in support of his apportionment instruction, verdict forms, or new trial motion, actually setting forth a "reasonable basis" for apportionment. Petitioner made no argument because a personal injury such as asbestosis, including the physical and mental harms resulting from that physical disease, is precisely the kind of classic "indivisible" injury appropriate for joint and several liability and not subject to apportionment.

Nor can petitioner now, in any event, correct its lapses at trial. The evidence must be read in the light most favorable to respondents as the prevailing party and petitioner cannot proffer possible bases for apportionment and new evidence.

Hence, while petitioner now suggests that damages might be apportioned based on "volumetric evidence" (Br. 38, 49), derived presumably from "the length of the plaintiff's periods of exposure, the quantity of asbestos contained in each product, and the extent to which those products emitted asbestos fibers" (Br. 42, 49), petitioner could have introduced such specific evidence with regard to Butler or Ayers, but did not do so. No reasonable basis for apportionment was ever proffered at trial.

Indeed, petitioner's own brief undercuts its theory (Br. 49) that the mere fact that Butler worked at one location for three months and at other locations for a nonrailroad employer for 30 years creates a reasonable basis for apportionment. The causal mechanics of asbestos exposure to asbestosis are hardly so simple. As petitioner itself explains (Br. 3, 24), because the risks created by asbestos exposure, including asbestosis are "dose-related," they "vary significantly with fiber type" as well as with "intensity and duration of asbestos exposure." See *id.* at 24 & n.19 ("certain asbestos fibers are less hazardous"). While there was evidence that the asbestos fibers at petitioner's employment were hazardous and that the exposure, especially in the repair shop where Butler worked for three months without any protection, was particularly intense (see note 3, *supra*), petitioner failed to introduce *any evidence* of fiber type, intensity or duration of actual exposure, presence or absence of protective measures, or ventilation, at any nonrailroad employment, let alone of the similarly absent "epidemiological evidence" to which petitioner now elusively refers (Br. 49).[29]

In arguing that a more "relaxed" apportionment standard should apply, petitioner also confuses the essential distinction between *apportionment* principles that limit a plaintiff's recovery and *contribution* principles that do not limit a plaintiff's recovery but apply instead only in lawsuits between jointly responsible defendants. Precisely because contribution does

[29] OSHA regulations reflect the complexity of the causal mechanics related to asbestos exposure and resulting disease. See, *e.g.*, 29 C.F.R. § 1910.1001 (exposure rate depends, *inter alia*, on fiber concentration, air flow rate, and fiber size); 59 Fed. Reg. 40964, 40970, 40992 (1994) (regulatory changes based on complexity).

not affect the plaintiff's ability to recover in full for her injuries, the courts do in contribution cases apply a dramatically reduced standard of divisibility and are much more willing to engage in rough speculation in allocating damages between various defendants. United States v. Brighton, 153 F.3d 307, 319 (6th Cir. 1998). Petitioner nonetheless cites in support of relaxed apportionment, which would deny plaintiff recovery, cases that are contribution actions. For instance, in *Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061 (5th Cir. 1986), cited by petitioner (Br. 42), the court was merely allocating damages in contribution between defendants. In direct conflict with petitioner's apportionment arguments here, the *Moore* court made clear that each of the defendants was jointly and severally liable for the plaintiff's entire injury. *Id.* at 1063. We do not deny the availability of contribution actions under FELA, and, as previously noted, FELA defendants have routinely filed such actions in the past. See p.36 & note 22, *supra*. But the availability of contribution, which diminishes the harshness of joint and several liability without doing violence to FELA's purposes, is a reason why apportionment is *not* available. It is *not* evidence of judicial acceptance of a relaxed standard of apportionment.[30]

[30] Petitioner similarly mischaracterizes the import of lower court cases arising under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* Although courts have held that "apportionment is available" (Pet. Br. 44), they have further held that pursuant to "traditional and evolving common law principles" it is available *only* when the injury is divisible and not, as in this case and virtually all CERCLA cases, where the injury is indivisible. See, *e.g.*, Chem Nuclear System v. Bush, 292 F.3d 254, 259-61 (D.C. Cir. 2002); U.S. v. Hercules, 247 F.3d 706, 716-19 (8th Cir. 2001); Brighton, 153 F.3d at 317-18 (6th Cir.); O'Neil v. Picillo, 883 F.2d 176, 178-80 (1st Cir. 1989); U.S. v. Monsanto, 858 F.2d 160, 171-73 & n.23 (4th Cir. 1988); U.S. v. Chem-Dyne, 572 F.Supp. 802, 808 (S.D.Ohio. 1983). In determining, moreover, when such indivisibility is present, the courts have uniformly rejected the kind of unduly simplistic volumetric approximation that petitioner here suggests (Br. 38, 49). See Monsanto, 858 F.2d at 172; Chem-Dyne, 572 F.Supp. at 811. In both *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) and *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992) cited by petitioner (Br. 45), the courts did not apportion damages; they simply concluded that a defendant was liable for no

4. Finally, FELA's language, structure, and well-established remedial purposes would compel rejection of any more relaxed standard for apportionment pursuant to either petitioner's unsupported account of common law principles (Br. 42-43) or its penultimate invitation (Br. 45-48) to this Court to adopt a new fault-based standard of apportionment.

As previously described, FELA's "simple and direct" language leaves no doubt that Congress intended for joint and several liability to apply where, as in this case, a railroad's negligence has been a partial cause of an indivisible injury. See pp. 34-39, *supra*. Pursuant to the statute's plain meaning, "[i]t does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes * * *" or that "the immediate reason" for the injury was "some cause not identified by the evidence." Rogers, 352 U.S. at 503, 506-07. For this reason, petitioner's characterization of how the common law should evolve to be more consistent with petitioner's "policy considerations" (Br. 45) is wholly beside the point. Petitioner's preferred policies cannot trump FELA's. In FELA, Congress "introduced a new policy and quite radically changed the existing law" to further "humanitarian purposes" by "permit[ting] recovery, in cases where recovery could not be had before, and tak[ing] from the defendant defenses which formerly were available." Winfree v. Northern P. R. Co., 227 U.S. 296, 302 (1913); Gottschall, 512 U.S. at 543.

Indeed, petitioner's account of what the common law should be or is becoming is both fictional and self-defeating. It is simply not true either that "most States now apportion even indivisible harms" or that joint and several liability has been "long abandoned" Pet. Br. 42, 50. Joint and several liability for

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damages if it was not a cause of the injury in the first instance. And, in *In re Bell Petroleum Servs.*, 3 F.3d 889, 903-04 (5th Cir. 1993), unlike in this case, the source of the injury was the same facility operated by different defendants and the defendant offered extensive, numerical evidence of the relative contribution for each time period. See *id.* at 903-04; Hercules, 247 F.3d at 718 ("Evidence supporting divisibility must be *concrete and specific*.") (emphasis supplied); Chem Nuclear Sys., 292 F.3d at 261 (ruling "some circumstantial evidence" insufficient for geographic divisibility).

indivisible harms clearly remains a dominant rule.

Most directly relevant to this case, joint and several liability remains today the settled rule in admiralty cases (see Schoenbaum, *supra*, § 514; Edmonds, 443 U.S. at 260-61)[31] and under the Jones Act, 46 U.S.C. App. § 688, which "adopts 'the entire judicially developed doctrine of liability' under [FELA]." American Dredging Co. v. Miller, 510 U.S. 443, 456 (1994), *quoting* Kernan v. American Dredging Co., 355 U.S. 426, 439 (1958). Federal courts apply joint and several liability under the Jones Act because, as this Court explained in *Edmonds*, describing the policies favoring joint and several liability in admiralty, otherwise "there will be many circumstances where the [employee] will not be able to recover in any way the full amount of the damages determined in his suit * * *." 443 U.S. at 269; see Joia v. Jo-Ja Service Corp., 817 F.2d 908, 916-17 (1st Cir. 1983); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1548 (11th Cir. 1987); Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1134 (5th Cir. 1995) (en banc). Similar uniformity is evident in federal hazardous waste law. Virtually every federal court to address the issue has concluded in the past two decades that "traditional and evolving common law principles" mandate the application of joint and several liability for indivisible injuries. See note 30, *supra*.

Nor does the *Restatement (Third) of Torts* (2000) compel a contrary view. The *Third Restatement* itself "takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent tortfeasors who cause an indivisible injury." § 17 comment a. The *Restatement* instead presents a varied list of five different possible approaches that reflect the diversity of state legislative efforts. *Id.* §§ A18-E21. The *Restatement's* accompanying survey further reveals that as of its writing 14 States and the District of

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[31] The Court's treatment in *McDermott* of the impact of settlement on defendant liability is similarly not inconsistent with the defendants' joint and several liability. In *McDermott*, the Court made clear that it was addressing only the impact of settlement and not disputing the threshold applicability of joint and several liability or otherwise disturbing its prior endorsement of that standard in *Edmonds*. See 511 U.S. at 210 n.10.

Columbia had retained joint and several liability substantially unmodified and of the states adopting hybrid schemes, many would apply joint and several liability in the circumstances of this case, involving toxic substances and absent third parties. *Id.* at § 17 comment a (pp. 149-59). Thus, approximately the same number of jurisdictions embrace traditional joint and several liability as did the "zone of danger" test characterized by this Court as "well-established" in *Gottshall*, 512 U.S. at 555.

But even the fact that some states have recently decided to adopt more limited joint and several liability standards undermines, rather than supports, petitioner's case. Almost all of these tort reform initiatives have resulted from the action of state *legislatures* responding to the competing and complex factors relevant to fashioning a liability standard. Whatever the respective merits of the many, widely divergent hybrid schemes emerging from that legislative process, they clearly reflect an evolutionary process suited to legislative action. They do not supply a precedential basis for judicial amendment of a compensation system, like FELA, which is "an interface of statutory and judge-made law," because "[o]nce Congress has relied upon conditions that the courts have created, [the Court is] not as free as we would otherwise be to change them." Edmonds, 443 U.S. at 272-73.

CONCLUSION

The judgments of the circuit court should be affirmed or in the alternative the petition for writ of certiorari should be dismissed as improvidently granted.[32]

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[32] Were this Court not to affirm the judgments below in their entirety, in no event would full reversal be warranted. On the first issue, only the amount of damages would be at issue, and petitioner's liability would not need to be retried. On the second issue, only the judgments for Butler and Ayers would be subject to remand because only for those two did petitioner argue below that there was evidence of asbestos exposure at nonrailroad employment that required an apportionment instruction.

Respectfully submitted.

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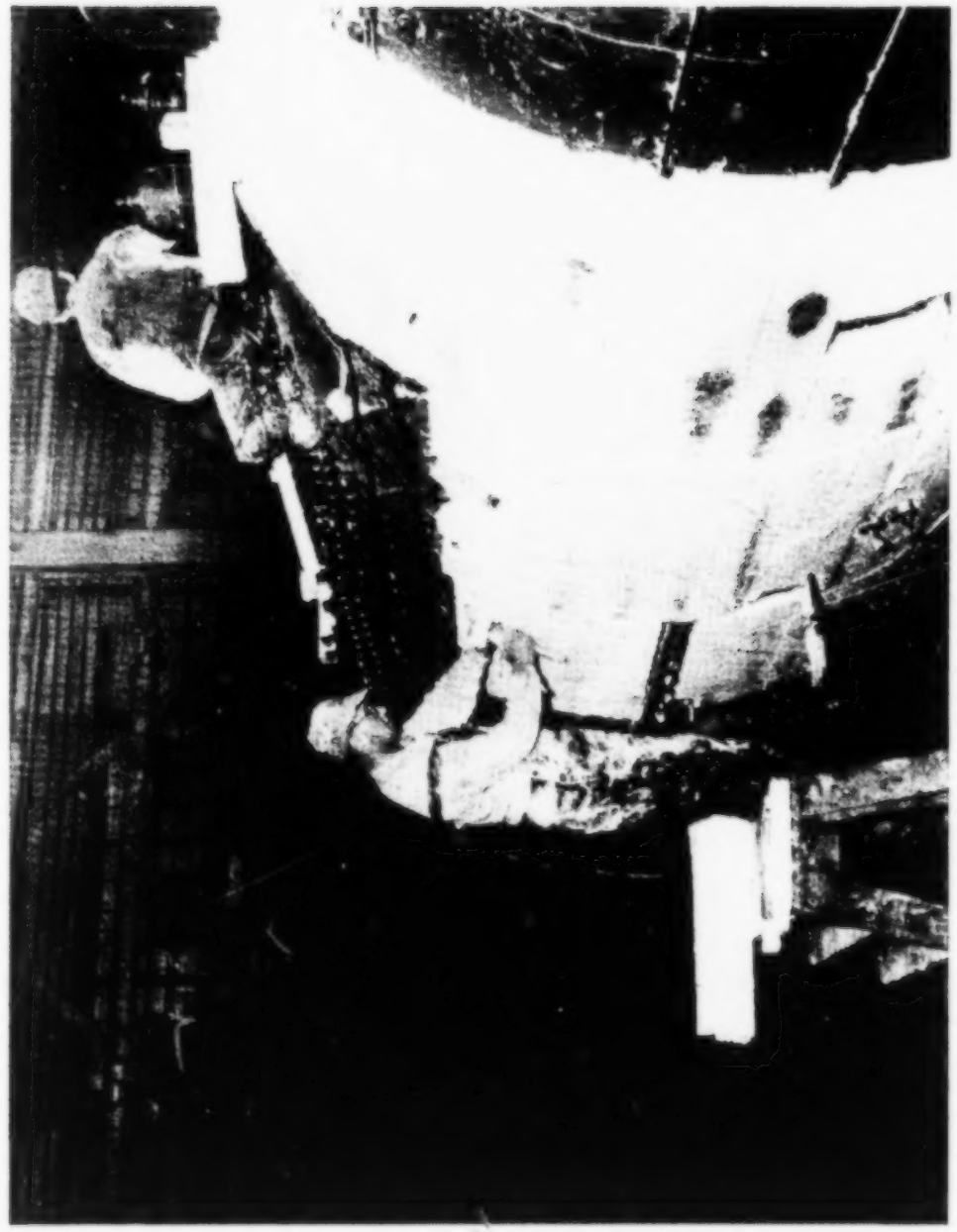
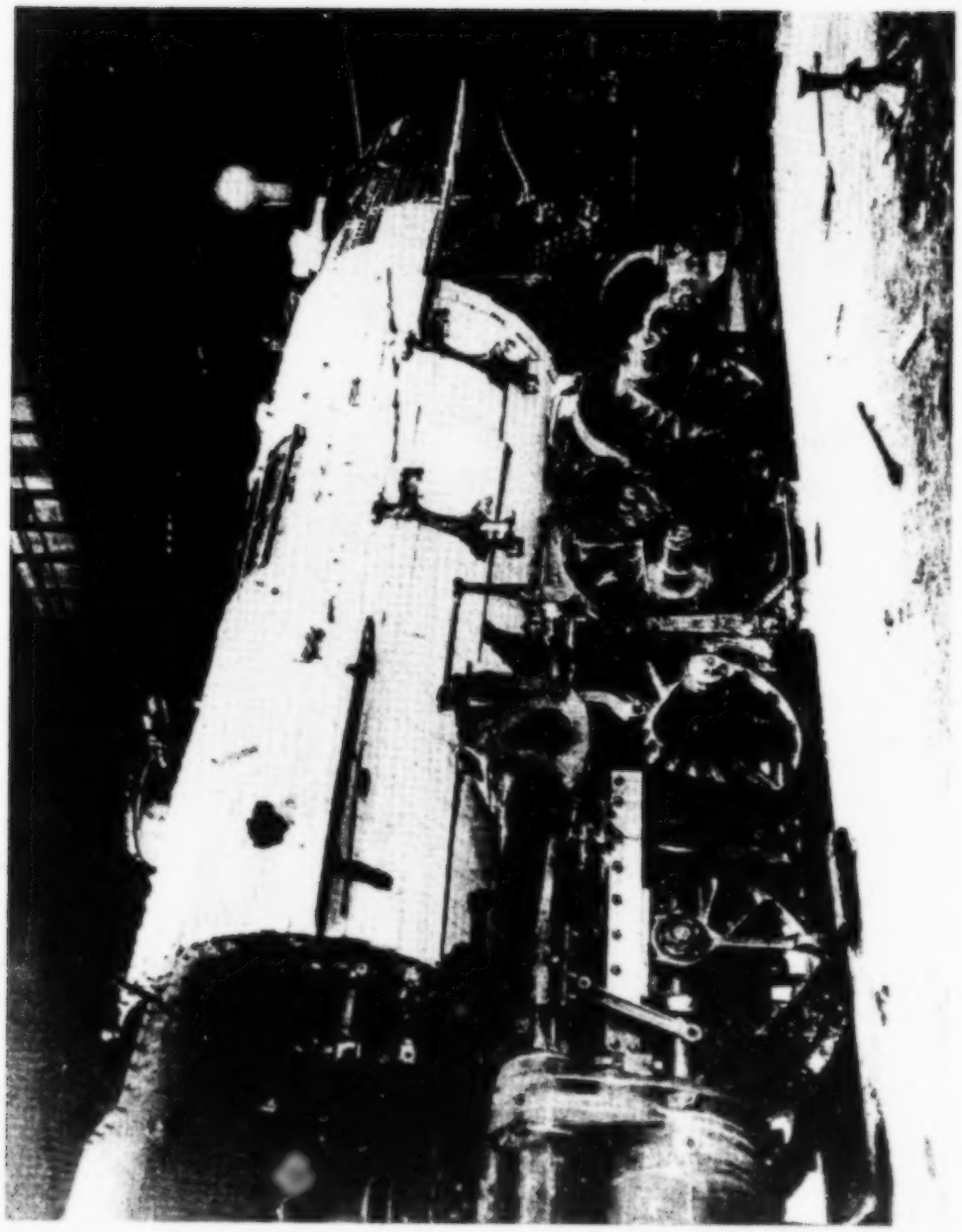
August 19, 2002

APPENDIX

Plaintiffs Exhibit No. 2 (17RR-1)



Plaintiffs Exhibit No. 3 (17RR-2)



Defendant's Exhibit No. 1

THE DIAGNOSIS OF NONMALIGNANT DISEASES RELATED TO ASBESTOS

THIS OFFICIAL STATEMENT OF THE AMERICAN THORACIC SOCIETY WAS ADOPTED BY THE ATS BOARD OF DIRECTORS, MARCH 1986

Objective

The health effects of asbestos have become a cause of serious concern in recent years. It has been estimated that from 1940 to 1979, in the United States alone, 27,500,000 individuals were exposed to this mineral at work. Recognition of the diseases caused by asbestos exposure has led manufacturers to reduce exposure in a variety of ways, such as by using alternative materials and by instituting improved work practices. It has also led to wide-spread public concern over the presence of asbestos in the environment, and fear on the part of persons with minimal exposure. This and projections of future asbestos related illness have posed important public policy questions -- whether to remove all asbestos in public buildings and what to do about the enormous estimated legal liability. In this context, physicians are commonly asked for advice. Furthermore, they are also consulted regarding the diagnosis of an asbestos-related respiratory condition in an exposed individual. While abundant literature exists on the health effects of asbestos, there is much that is conflicting. Accordingly, this report has been prepared by a group of experts to present an authoritative consensus view of the current state of knowledge while pointing out areas where additional information is necessary. An attempt is made to summarize our present knowledge on the diagnosis of nonmalignant asbestos-related pulmonary disease and provide the sources on which the opinion is based.

Asbestos -- the Mineral

The generic term "asbestos" is used to describe a group of minerals which, when crushed, break into fibers rather than dust. They are hydrated fibrous silicates which have great tensile strength, heat resistance, acid resistance, and some varieties are also flexible. This weavable rock has numerous important uses in an industrial society, and world production and use climbed steadily since its commercial introduction in the late 19th century. Geology, mineralogy, and uses have been well described elsewhere (1,2). World production of asbestos has dropped markedly since the mid 1970's. The cumulative production of asbestos, however, continues to increase. There has been a good deal of debate about the mineralogic definitions of asbestos and asbestiform fibers. The most complete recent discussion on trends in asbestos production and now widely accepted mineralogic definitions are found in the NAS Report on asbestiform fibers (3).

Asbestos in Lung Tissue

Inhaled asbestos that is retained in the lung can become coated with a proteinaceous iron staining material. The resulting asbestos or ferruginous body is a most characteristic index of asbestos exposure. It is usually recognized by its beaded-necklace or drumstick appearance. The longer fibers are more likely to become coated (2-22). The core of asbestos, i.e., bodies found in human lungs, is more likely to be an amphibole fiber than to be chrysotile, perhaps due to the greater ability of the former to survive in lung tissue, while chrysotile tends to disappear over time. The majority of the lung burden of asbestos, however, is uncoated and consists of short fibers, i.e., less than 5 microns (2-21). These are poorly visible or invisible on light microscopy but have been demonstrated by phase microscopy and electron microscopy. Asbestos bodies are commonly found in small numbers in lungs of city dwellers at routine autopsies in the absence of occupational exposure to

asbestos and asbestos related illness. These are usually few in number and unassociated with pathologic abnormality in the parenchyma. This observation emphasizes the importance of developing standardized techniques to quantify the number and type of asbestos fibers in lung tissue (to be discussed below).

Benign Pleural Abnormalities Associated with Asbestos

Asbestos causes pleural plaques, pleural thickening and pleural effusion. Pleural plaques are discrete, elevated, opaque, shiny, rounded lesions. They characteristically occur on the posterolateral aspect of the lower parietal pleura or diaphragm, but usually not on the visceral pleura, at the costophrenic angles, or at the apices. Thin plaques are smooth and grayish-white. Thicker ones are ivory-colored or gray and may have either a smooth surface or bosselated surface, or be coarsely nodular with the consistency of cartilage. Plaques are of two types, diffuse or nodular, and elevated. They can vary in size and shape. On inspection of gross specimens, calcification may be present but is not common. Microscopically, plaques are seen to be laminated collagenous connective tissue, acellular, with few inflammatory or fibrocytic nuclei; many are covered by a thin layer of regular and well-differentiated mesothelial cells. Capillaries are rare (23, 24). Elastic staining shows intact lamellae beneath the plaque in continuity with the surrounding normal parietal pleural connective tissue, suggesting that plaques are extrapleural and develop between the latter and its covering layer of mesothelial cells (23). On microscopic examination, calcium deposition is present in a large proportion of plaques, and occurs as deposits along with the course of the collagen fibers, ceasing abruptly where the connective tissue changes into normal pleural tissue (23). Well-differentiated cuboidal mesothelial cells are present on the surface and the edges of the plaque (23); metaplastic changes are uncommon (24, 25).

Although coated asbestos fibers have not been reported in

relation to pleural plaques in the extensive series of 172 sections examined by Meurman (23) using polarized light, the presence of many uncoated fibers may be noted when ashed tissue is studied (26, 27). Recent studies of the digestate of a small number of plaques has demonstrated the presence of submicroscopic fibers of both chrysotile and amosite fiber in these structures. It is of interest that these are more concentrated in the calcified zones than in the fibrous zones (28).

The usual effect of asbestos on the visceral pleura is a focal or diffuse thickening. This varies from a thin, milky white discoloration, detectable only on gross visualization to a thick peel encasing the lung and easily seen on chest roentgenogram. In contrast to plaques, which are frequently diagnosed roentgenologically in asymptomatic persons, pleural fibrosis may cause symptoms and impair pulmonary function.

Pleural effusion may be caused by inhalation of asbestos; this is an early manifestation and is usually an exudate. On rare occasions it may persist for months or years. It may recur on the same or the opposite side after several years of exposure. In unusual circumstances it may be bilateral. Macroscopically, the fluid may be blood stained with variable numbers of erythrocytes, macrophages, lymphocytes, and mesothelial cells (29).

Pulmonary Asbestosis

Definition

The term asbestosis should be reserved for the interstitial fibrosis of the pulmonary parenchyma in which asbestos bodies or fibers may be demonstrated. While pleural abnormalities are commonly associated with a parenchymal disease, they should be separately classified as there are differences between pleural and parenchymal fibrosis in epidemiology, clinical features, and prognosis.

Pathologic Features

In lungs with minimal or moderate fibrosis, the changes may be subtle and difficult to demonstrate. On examination of gross specimens, they appear as gray opaque areas devoid of air spaces in an otherwise brown lung. The microscopic changes in pulmonary asbestosis vary from small areas of basal fibrosis to a diffuse, fine fibrosis of both lungs.

In general, the more extensive the process the smaller the volume of the lungs. The cut surface of the lung has a dark brown color with streaks of a fine, gray-colored fibrosis that generally appears to affect subpleural areas first and, frequently, in multiple and separate areas. This fibrosis may accentuate lobar and lobular septa and extends projections into the lung parenchyma. The parenchymal fibrosis, which has a linear and reticular appearance by X-ray, affects the lower lobes first, and extends upward with prolonged or heavy exposure (10, 30, 31). The fibrosis may take one of three forms. One is a diffuse fibrosis without air space enlargement; a second form is called honeycombing. This form may affect the lower lobes and subpleural regions (31). The third form is a combination of both diffuse fibrosis and honeycombing. This latter form is the one most frequently observed. The honeycombing is characterized by enlarged thick-walled air spaces ranging in size from 1 to 15 mm (32). The pleural surface adjacent to the fibrosis is invariably involved in the fibrotic process, either mildly with the appearance of a milky covering to the fibrosis, or with widespread fibrosis and symphysis (30, 31). The hilar lymph nodes are only sightly enlarged and soft unless other disease coexists. While emphysema has been reported in the past, it is unusual, and may have been incorrectly labeled as honeycombing (10, 33).

Microscopic Appearances

There is little information on the early pathophysiology of

asbestosis in humans. Current opinion is largely based on inferences from animal studies. Some evidence exists that release of lysosomal enzymes may result from the partial ingestion of the asbestos fibers and the incomplete fusions of the phagosome membrane, so allowing the release of enzymes into the medium from lyosomes which have fused with the phagosome. The cytotoxic activity of asbestos exhibited by the release of lysosomal enzymes may result from the fibers penetrating intracellular structures, such as the nucleus and lysosomes, by preventing the movement of organelles within the cytoplasm, or by disrupting the cytoplasmic organization provided by microfilaments and microtubules (34). In any case, the initial reaction to asbestos fiber introduced into the lung is the immediate exudation of neutrophils and macrophages into the alveolar spaces in the locus of asbestos. This exudate varies with the age of the lesion. In the initial stages the exudate may be predominantly neutrophilic. Macrophages are the most common cells in the infiltrate. The inflammatory infiltrate soon is associated with varying degrees of organization with fibrosis (35, 36). The process is believed to be concentrated initially in peribronchiolar regions (10, 30). The initial lesion after exposure by inhalation is in the region of the respiratory or terminal bronchioles. There is a macrophage exudate in the lumen associated with asbestos fibers and bodies. Metaplasia of the cuboidal epithelium to squamous type may occur. In the early states, fibrosis may be minimal but, when present, is in the respiratory and terminal bronchiolar regions and in the alveoli arising from the most proximal alveolar ducts. Alternatively, there may be coboidalization of the epithelial cells. Characteristically, in early stages only an occasional pulmonary subunit is involved. More advanced cases show a diffuse fibrosis, involving the interstitium, frequently associated with areas of extensive fibrosis with obliteration of air spaces and condensation of the bronchovascular structures. Areas adjacent to the fibrosis may show accumulation of alveolar macrophages, some of which have ingested asbestos fibers or other fragments. Alveolar epithelial hyperplasia may also occur. When moderate

or severe degrees of fibrosis are present, the small pulmonary arteries and arterioles are thickened and sclerotic (30). (The presence of uncoated asbestos fibers and asbestos bodies in the presence of interstitial fibrosis is mandatory for the pathologic diagnosis of asbestosis.)

Before a pathologic diagnosis of asbestosis can be made we must consider a number of problems, including the following:

1. There are numerous other causes of interstitial fibrosis.

2. The distribution of interstitial fibrosis in asbestosis may be irregular, and therefore, adequate sampling of the lung must be done. The lingula and the right middle lobe are particularly prone to nonspecific fibrosis and sampling must take this into consideration.

3. While advanced asbestosis characteristically shows numerous asbestos bodies, they may not always be found because many fibers are cleared from the lungs and some, particularly chrysotile, may undergo dissolution and fragmentation with time (32). Thus, in unusual cases it may be difficult to demonstrate fibers or asbestos bodies in the histologic preparation. When that is the case, 5 to 10 additional sections from the same block, and 5 to 10 additional new blocks from areas with fibrosis, should be prepared, stained, and surveyed for asbestos bodies. If they are not found, the diagnosis of asbestosis is unlikely.

4. Even in the absence of a history of asbestos exposure, the presence of several or more asbestos bodies in areas of extensive interstitial fibrosis is sufficient evidence for a morphologic diagnosis of asbestosis.

5. Not everyone who inhales an asbestos fiber, or even a few fibers, develops even microscopic asbestosis. Normal lung defense mechanisms remove fibers via several well-

described mechanisms.

The Pneumoconiosis Committee of the American College of Pathologists and National Institute for Occupational Safety and Health dealt with these considerations when formulating the following statement with which we concur:

> "The criteria that permit the pathologist to establish the diagnosis of asbestosis have evolved during a review of many cases of the disease. Presently, the minimal features that permit the diagnosis are the demonstration of discrete foci of fibrosis in the walls of respiratory bronchioles associated with accumulations of asbestos bodies. These morphologic findings, although adequate to establish the diagnosis of asbestosis in an early evolutionary stage, have not been shown to result in functional and radiologic alterations. The demonstration of asbestos bodies in the absence of fibrosis is insufficient evidence to justify the diagnosis of asbestosis. Conversely, a definite diagnosis of asbestosis cannot be made by the pathologist in cases that show characteristic fibrosis in the absence of asbestos bodies or other evidence of fibers. Because asbestos bodies are unevenly distributed in tissue, an adequate number of samples should be examined thoroughly." (32)

They further state that although the demonstration of asbestos fibers by the electron microscopic study of tissue digestates provides evidence of exposure, ultrastructural technique alone cannot be used to establish definitively the etiologic role of asbestos in disease (32).

This Committee has published guidelines for methods of assessing lung fiber concentration and pathologic grading of asbestosis. The certainty of the cause and effect relationship of asbestos to the fibrotic process increases with increasing numbers of such particles and fibers visualized by light microscopy. Electron microscopy of digested lung preparation

from documented cases of asbestosis shows very large numbers of uncoated fiber fragments (37).

Since asbestos bodies and fibers appear in lungs without evidence of asbestos-related disease, the question arises as to how many such bodies are necessary to infer a cause and effect relationship between asbestos particles and fibrosis. No precise answer exists, but efforts to quantify the numbers of asbestos particles in known cases indicate that it is high. In the cases of asbestos studied by Whitwell, the lungs nearly always showed three million light visible fibers per gram; control lungs generally show less than 20,000 fibers per gram (38).

Electron microscopy is a more sensitive index of asbestos exposure than light microscopy. It will detect 10 to 100 times more fibers than seen by light microscopy. Fibers seen only by light or electron microscopy, in the absence of parenchymal fibrosis, indicates only that exposure to asbestos has occurred. Additional studies are required to define the number of fibers in the lungs of persons with a variety of occupational exposures, and with varying periods of exposure, as well as in nonoccupational populations.

Investigations have demonstrated that as many as a million fibers per gram of dry tissue of chrysotile may be present in the lungs from nonoccupational exposures in the general population. By contrast, lungs containing a million fibers of amosite or crocidolite per gram are considered to reflect substantial occupational exposure to asbestos dust (39). An electron microscopic field of necessity represents a small sample of the lung and analysis of multiple fields is required to reflect the true asbestos lung burden. In our opinion, additional studies on the numbers and types of asbestos fibers in the lungs of control and exposed persons must be performed to provide the informational bases for interpretation of quantitative data concerning asbestos fibers in the lung and their relation to the presence of asbestosis or other asbestos related diseases.

Exposure History

Numerous studies have shown that asbestosis has a relatively close association with both the magnitude and the duration of exposure to inhaled asbestos; the more intense and longer the exposure, the greater the numbers of affected workers and the greater the severity of their illness. There is no evidence that casual or indirect exposure, such as occurs in the general population, causes asbestosis. The major problem facing the clinician is to assess whether an exposure has been sufficient to cause disease. Although dust levels have been measured in many industries for many years, they are not usually available to or easily interpreted by clinicians. Nevertheless, some general statements can be made. A careful sequential history of all exposures to all potentially harmful substances is obviously important. Particular attention should be paid to occupations in which direct contact with asbestos has occurred. Consultation with physicians trained in occupational medicine or with industrial hygienists may be helpful in unclear cases.

Evidence of asbestosis has been found many years after relatively brief but extremely heavy exposure. Such exposure often occurred in the asbestos textile industry over 50 years ago and has occurred more recently in workers who have not used respiratory protection while spraying dry asbestos on steel beams. Fortunately, such exposure is rare at this time. With levels of exposure common in the past few decades, the latent period between the state of the exposure and the discovery of the manifestations of asbestosis is likely to be a minimum of 15 years, and more often considerably longer. With exposures below the current recommended permissible exposure limit value, asbestosis is not likely to be found during he course of a working career. With proper engineering controls, work practice, and where necessary, personal respiratory protective devices, asbestosis should not occur.

Clinical Diagnosis

In the usual clinical setting, the diagnosis of asbestosis has to be made in the absence of histologic examination of lung tissue. Open lung biopsy is rarely indicated in the assessment of workers for compensation purposes. The benefit of the doubt should be given whenever the clinical features and occupational exposure data are compatible with the diagnosis. In most instances, the clinician and epidemiologist must still rely on indirect methods of diagnosing asbestosis. These principles of diagnosis are based on observations from pathologically proven cases. When biopsy is done, careful attention must be paid to the sampling considerations mentioned above and the surgical technique employed (40). Assessment of lung dust burden in such biopsy material is desirable. Diagnosis of asbestosis does not mean that measurable impairment of lung function or physical disability is necessarily present.

Clinical Features

In advanced stages, asbestosis is a restrictive lung disease associated with dyspnea, clubbing of the fingers, basilar crackles and wide-spread irregular opacifications on roentgenograms. The latter are usually more prominent at the lung bases. Pleural thickening and calcification may also be present as noted above. The vital capacity is usually reduced with preservation of the FEV_1/FVC ratio and gas exchange impaired. Cor pulmonale may occur in advanced disease. When many or all of these features are present the diagnosis is made without difficulty. However, in the absence of the opportunity to examine lung tissue microscopically, the diagnosis is always inferential. The certainty increases with increasing numbers and severity of typical clinical abnormalities.

The chest roentgenogram appears to be the most valuable examination in diagnosing asbestosis. A diffuse irregular interstitial pattern coupled with evidence of pleural disease, e.g.,

plaques or extensive pleural thickening in a person with known exposure, presents little diagnostic difficulty. The difficulty with the use of the chest roentgenogram relates to the detection of lesser degrees of interstitial fibrosis. Efforts have been made to standardize the interpretation of roentgenograms in the pneumoconioses. The most widely accepted and extensively studied method for assessing the degree of roentgenologic involvement in the pneumoconiosis was developed by the International Labour Office and is currently called the ILO-1980 Classification (41). This scheme evolved from studies of miners and focused initially on the detection of silicosis. The X-ray appearance of silicosis is characterized initially by small rounded opacifications. The classification was later broadened to describe abnormalities which occur in asbestosis and do not have a rounded appearance. These are fine, medium and coarse, small irregular opacifications, and they are called s, t, and u, respectively. The classification, originally developed for describing radiologic changes in epidemiologic studies, has also been used in the clinical context for case detection and/or diagnosis. In the latter instance, the information given in the chest radiograph is added to all other information about the individual in order to arrive at a diagnosis.

The number of these abnormalities in a given area of the chest film, whether rounded or irregular, is called their profusion. The profusion was initially graded as 0 for none, 1 for slight, 2 for moderate, and 3 for severe.

It became apparent, however, that even experienced readers had difficulty in grading specifications into these categories in a reproducible fashion. However, if observers were asked to give two classifications, i.e., the one category they thought was most likely and another which they thought might also be considered, the observer reliability (i.e., in terms of reproducibility) was considerably improved. This method of giving the observer two options (the one he thought most likely and next most likely) was called the expanded classification. It formed a 12-point

scale that has proven to be very useful epidemiologically.

It is likely that an individual who develops asbestosis moves more or less uniformly from the normal roentgenologic appearances (-/0, 0/0, 0/1) to the abnormal (1/2, 2/1, 2/2, etc.). The problem is that the interpretation of the lesser degrees of abnormality on this scale is subjective and that numerous causes of such roentgenologic shadowing other than asbestosis exist. In the presence of marked diffuse pleural thickening, it is difficult to diagnose or grade the severity of interstitial fibrosis. Accordingly, criteria other than roentgenographic ones have been sought.

Dyspnea

Asbestosis has been described as a monosymptomatic disease, dyspnea being the major complaint of the affected individual (42). There is no doubt that shortness of breath is common and troublesome in individuals with clinically significant interstitial fibrosis. Dyspnea, however, is a nonspecific symptom, common in many other cardiopulmonary disorders, and it is particularly subject to emotional factors likely to be relevant in instances of suspected industrially-related disease. Accordingly, it is not adequate to use dyspnea as the only evidence on which to base a clinical diagnosis of asbestosis in an individual at risk.

Clubbing

Clubbing of the fingers occurs more commonly in asbestos-exposed workers than in controls (43, 44, 45). The diagnostic usefulness of clubbing is limited, however, by two important considerations. There are many other causes of clubbing and clubbing, when present, is a late finding in pulmonary asbestosis (46). Since the majority of persons with significant asbestosis do not have clubbing, and asbestos workers with clubbing may have it for reasons other than pulmonary fibrosis, the diagnostic usefulness of clubbing is limited.

Basilar Crackles

Crackles have been recognized as a feature of asbestosis for over 50 years and are believed by many to be an early finding (47, 48, 49). They have been described as characteristic in their sound ("fine", "cellophane," "velcro," "close to the ear") and in their bilateral, basilar distribution (50). They differ in quality and timing from the crackles of bronchitis which tend to be fewer in number and earlier in timing. Bronchitic crackling begins with the beginning of inspiration and usually discontinues prior to mid or late inspiration. Characteristically, the crackles of interstitial fibrosis are pan inspiratory or have an end inspiratory accentuation. They appear first at the bases in the mid-axillary lines and tend to spread toward the posterior bases. As the disease advances, the crackles become distributed at progressively high levels up from the bases (50). They are often difficult to distinguish from the crackles of congestive heart failure. Reported rates vary, but about half of the persons considered to have asbestosis on clinical grounds have crackles (47, 51, 52, 53); prevalences in exposed populations range from about 10-20%. Such prevalences depend on duration of exposure, the age of the population, and prevalence of other disease causing fine crackles. Observer variability exists in chest auscultation, but this can be reduced by training and waveform analysis (54, 55, 56). In summary, under carefully controlled circumstances crackles can be useful in diagnosing interstitial fibrosis. However, they are not also specific for the interstitial fibrosis related to asbestos.

Pulmonary Function

The characteristic features of pulmonary asbestosis are those of a restrictive lung disease, i.e., a reduction of lung volumes, with inspiratory capacity and vital capacity being primarily affected, functional residual capacity being less affected, and residual volume even less. These changes are consistent with a decrease in pulmonary compliance. Hypoxemia may be present at rest or

develop with exercise. Diffusing capacity is also usually impaired, depending on the extent of the disease. By contrast, large airway function as reflected in the FEV_1/FVC ratio is generally well preserved. Review of the prediction formulas for pulmonary function tests reveals there is no one set applicable to all laboratories and patient populations. Predicted normal values used in pulmonary function laboratories should be based on regression equations from studies whose testing equipment, methodologies and control populations most clearly resemble the patients under study. Numerous studies have shown that the effects of asbestos on lung function are dose related (57, 58, 59).

There is convincing evidence that an asbestos related pulmonary abnormality can occur in the absence of definite radiologic change. These pathologic changes of early asbestosis have been demonstrated in biopsy material from asbestos-exposed individuals with minimal or no radiologic abnormality (60). Likewise, exposure response relationships for certain pulmonary function abnormalities (including reduced lung compliance and impaired flow at low lung volumes) have been demonstrated in asbestos-exposed subjects without radiologic abnormalities or reduction in vital capacity (58), and their occurrence subsequently confirmed in large animal models with biopsy confirmation of the associated pathologic changes. The impairment associated with such abnormality is usually modest.

Diffusing Capacity

Diffusing capacity or transfer factor has been the subject of numerous studies with somewhat conflicting results. In most studies of unexposed populations it is lower in asbestos exposed workers than in normal controls although not always at a statistically significant level (44, 45, 57, 62, 63). There is not always a clear relationship to dust exposure indices (58, 64). It has, however, been shown to correlate with the severity of the histologic lesion in interstitial fibrosis (64), and its reduction can precede roentgenologic abnormalities. At this time a reduction

of the diffusing capacity in an asbestos worker, in the absence of other known causes for impaired gas exchange, would provide suggestive evidence for asbestosis, but further population studies are necessary to elucidate the precise role of this test.

Other Studies

Various other measurements have been employed for monitoring persons exposed to asbestos. A reduction in roentgenologic lung volume appears promising since it is applicable to serial studies of patients, but it requires careful control of inspiration (66). This approach has not yet been taken in a large number of subjects exposed to asbestos.

Inspiratory capacity was shown to be suitable for surveillance of workers but is not likely to add much more than vital capacity (VC) as the two tests are highly correlated (59). This finding suggests that tests for small airways disease might in the future be applicable to early detection (67). In one study, neither closing volume nor closing capacity correlated with the duration of exposure or with the asbestos dust index (68). Gallium scanning, bronchoalveolar lavage, and transbronchial biopsy need further evaluation with respect to their usefulness in diagnosing asbestosis. CT scanning is of particular value in detecting and quantitiating pleural disease and aiding in the differentiation of pleural from parenchymal disease. The value of CT scanning in the detection of interstitial fibrosis also needs to be further evaluated. Thus, at this time, criteria other than crackles, restrictive lung functional abnormality, reduced diffusing capacity of the lung (D_L), and roentgenogram consistent with interstitial fibrosis of 1/1 or more are either impractical, of unproven value, or are not likely to yield additional information because of their high correlation with one of these four.

In our opinion, combinations of these abnormalities are more reliable in terms of specificity, relation to duration of exposure,

consistency, and predictive value; however, little work has assessed combinations of abnormalities.

Combinations

Combinations of abnormal test results are not likely to prove more effective in detecting the earliest changes in asbestosis. Intuitively, one test is likely to become abnormal first. It is likely that the first abnormality is not always the same one (e.g., one worker may have only an abnormal D_L [69], and another only crackles as the first manifestation). This has been demonstrated with respect to restrictive lung function pattern and reduced D_L. It is likely that observations will have to be made in large groups over long periods to delineate clearly the best single test for early diagnosis of asbestosis if, indeed, a single initial abnormality exists.

Differential Diagnosis

Streaky densities on chest films consistent with a parenchymal disease have many causes. All alternative diagnoses must be considered before accepting the presumptive diagnosis of asbestosis.

Occasionally, asbestosis is coexistent with chronic obstructive pulmonary disease. Evidence is accumulating that obstruction may also be related to an individual's occupational exposure (70). The relative importance of cigarette smoking and asbestos in the development of the combined problem of restrictive and obstructive disease may be difficult or even impossible to assess.

Since a not uncommon feature of asbestos exposure is bilateral pleural thickening, the question arises as to the helpfulness of such thickening in indicating that a patient with pulmonary fibrosis has asbestosis. Indeed, asbestos appears to be a rather potent stimulus for the development of pleural abnormalities. Selikoff found pleural fibrosis in 65% of persons he studied 40

years from the onset of their initial exposure to asbestos. With patients with no known exposure to asbestos or other known hazardous materials (71), the question arises as to whether an indirect or occult exposure to asbestos might have caused the pleural thickening. Severe diffuse pleural thickening is not common even in asbestos exposure. It was present in only 2.5% of the asbestos workers studied by Selikoff. Since there were no controls in that study, it is difficult to be certain that asbestos was the cause of the pleural fibrosis in those subjects. Indeed, Gilson reported in 1969 that pleural thickening was found on 187 of 3,860 (0.05%) routine roentgenograms of the chest in Great Britain (72). He conducted one of the few objective studies of pleural thickening by comparing the asbestos exposure of 113 of the 187 subjects with that of 113 age- and sex-matched controls. He found "a slight but unimpressive excess of positive histories of exposure to asbestos among the cases." Thus, it is not necessary to assume an occult exposure to asbestos in every instance of pleural thickening; the presence of pleural thickening is not definitive evidence of asbestos exposure. In another study, bilateral pleural thickening was found in 52 of 824 consecutive patients admitted to the hospital. Only 13 of these 52 had definite asbestos exposure as compared to 2 of 32 age-matched controls. In contrast to the relatively nonspecific finding of pleural thickening, the demonstration of pleural plaques with or without calcification is better evidence of asbestos exposure. Unfortunately, the latter usually occurs only many years after the onset of the exposure, thus limiting usefulness of early diagnosis.

A major problem exists in the differential diagnosis when more than one disease is present, whether it is congestive heart failure, COPD, or other chronic lung disease. There are diseases unrelated to asbestos exposure but with similar symptoms, and these may occur in some persons with asbestos exposure. However, given a clear history of exposure to asbestos, a diffuse interstitial fibrosis can be presumed to be due to the asbestos as other forms of interstitial fibrosis are relatively uncommon. The prevalence of lesser degrees of interstitial fibrosis is not well

known and considerable caution has to be exercised in attributing all such phenomena to asbestos exposure, either known or occult.

Summary

This document has focused on clinically detectable interstitial fibrosis due to asbestos exposure. While direct examination of lung tissue is the most reliable method of diagnosis, as stated above, this is rarely indicated in the assessment of workers for compensation purposes. Open lung biopsy is indicated in our opinion only when a clear health, rather than financial, benefit is likely to be provided. In the absence of pathologic examination of lung tissue, the diagnosis of asbestosis is a judgment based on a careful consideration of all relevant clinical findings. In our opinion, it is necessary that there be:

1. A reliable history of exposure.

2. An appropriate time interval between exposure and detection (see pages 9-10)

Furthermore, we regard the following clinical criteria to be of recognized value:

1. Chest roentgenographic evidence of type "s," "t," "u," small irregular opacifications of a profusion of 1/1 or greater
2. A restrictive pattern of lung impairment with a forced vital capacity below the lower limit of normal
3. A diffusing capacity below the lower limit of normal
4. Bilateral late or pan inspiratory crackles at the posterior lung bases not cleared by cough

Of these, the findings on the chest roentgenogram are the most important. When this criteria is not met, considerable caution is warranted. The specificity of the above criteria increases with increasing numbers of positive criteria. As in all clinical

judgments, confounding variables, such as the presence of other clinical conditions that affect these criteria, should be evaluated.

It is possible that interstitial fibrosis may be present even though none of these criteria are satisfied, but, in our opinion, in these circumstances the clinical diagnosis cannot be made.

This statement was prepared by an Ad Hoc Committee of the Scientific Assembly on Environmental and Occupational Health in conjunction with the American College of Chest Physicians. The members of the Committee were:

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Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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REPLY BRIEF

Respondents seek an unwarranted expansion of the damages recoverable under FELA. There is no sound basis in the historical or evolving common law for plaintiffs diagnosed with mixed-dust pneumoconiosis or asbestosis to recover damages for fear or concern, based solely on their perceptions of the statistical risk that in the future they may develop a distinct cancerous disease that does not result from their present injury. Nor is there any basis for their claim that no matter how minimal their asbestos exposure during railroad employment, the railroad must pay the entirety of their asbestos-related damages. FELA expressly limits railroad liability to injury incurred in railroad employment caused by the railroad's negligence, and the common law has always required apportionment of injury by cause on any reasonable basis. Because lung scarring occurs as a result of the body's response to individual retained fibers, and the damage caused by railroad exposure is separate even if unobservable, asbestosis is a divisible injury for which damages can and should be apportioned by cause.

1. Respondents' claim that the jury was properly instructed to award damages for fear of cancer as "pain and suffering," JA 573, is insupportable. As this Court has recognized, this term refers to distress "'stemming directly from,'" or "directly brought about by a physical injury." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994). Pain and suffering was the earliest form of mental anguish for which the common law permitted recovery because of the indivisibility of mental pain and suffering, Pet'r Br. 14-15, and encompasses anguish that is "'the outgrowth or result of the physical suffering.'" C. McCormick, *Handbook on the Law of Damages* § 88, at 315 n.3 (1935). Accordingly, this Court in the era of FELA's enactment rejected a challenge to a jury instruction allowing damages for mental suffering because the instruction properly limited them to those that were "a direct and necessary consequence of the physical injury."

McDermott v. *Severe*, 202 U.S. 600, 611 (1906); *Kennon* v. *Gilmer*, 131 U.S. 22, 26-28 (1889). This is still the accepted understanding. *Gottshall*, 512 U.S. at 544; D. Dobbs, *The Law of Torts* § 311, at 844 (2000); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805, 807-08 (Cal. 1993).

Respondents and their *amici* do not dispute that there is no accepted medical evidence that lung cancer—much less mesothelioma (a cancer of the pleura or peritoneum, not the lung tissue)—results from, or is a complication of, asbestosis. Resp'ts Br. 13; Pet'r Br. 2-3; U.S. Br. 11-12. Fear of cancer is thus not compensable as pain and suffering from asbestosis. Respondents' dog-bite cases are readily distinguishable. Tetanus (lockjaw) and hydrophobia (rabies) both result from the wound.[1] Similarly, no reliance can be placed on cases permitting damages for fear of cancers that are complications of the physical injury (such as radiation burns). *E.g.*, *Anderson* v. *Weldin Testing Lab., Inc.*, 304 So. 2d 351, 354 (La. 1974). See *Barron* v. *Martin-Marietta Corp.*, 868 F. Supp. 1203, 1212 (N.D. Cal. 1994) (a physical injury permits fear of cancer damages only "where there is a verifiable causal nexus between the injury and developing cancer").

Respondents point to the second clause of section 456(a) of the *Restatement (Second) of Torts* (1965) ("*Restatement (Second)*"), which declares that a person who has suffered compensable bodily harm may recover for "fright, shock, or other emotional disturbance resulting from the bodily harm *or from the conduct which causes it*" (emphasis added). But this second clause (italicized above) refers not to pain-and-suffering damages, but to the traditional "physical impact" rule. *Id.* cmts. d, e; *Beynon* v. *Montgomery Cablevision Ltd.*

[1] *See American Heritage College Dictionary* 1124, 1402 (3d ed. 1997) (tetanus is caused by a bacterial toxin "which typically infects the body through a deep wound"; rabies is "transmitted by the bite of infected animals"). Respondents' cases allow damages for disease fears "'occasioned by the bite.'" *Buck* v. *Brady*, 73 A. 277, 279 (Md. 1909); *Ayers* v. *Macoughtry*, 117 P. 1088, 1090 (Okla. 1911); *Godeau* v. *Blood*, 52 Vt. 251, 251 (1880); *Heintz* v. *Caldwell*, 9 Ohio Cir. Dec. 412, 412 (1898).

P'ship, 718 A.2d 1161, 1166-67, 1184-85 (Md. 1998); *cf. Gottshall*, 512 U.S. at 547 (noting that the impact rule applies to emotional distress that is "contemporaneously sustained" with "injury" or physical contact); *Nelson* v. *Metro-N. Commuter R.R.*, 235 F.3d 101, 107, 108 n.6, 110 (2d Cir. 2000) (Calabresi, J.) (noting that "[a]s originally formulated, the physical impact rule required a physical *injury*," and that *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424, 437 (1997), correctly "restated the traditional rule that an event cannot constitute a physical impact, even if it entails contact, unless it has a physically harmful effect on the body").

Respondents cannot find shelter under the "physical impact" rule. This rule addresses emotional injury from immediately traumatizing conduct that is coincident with (and not derived from) compensable physical injury. See *Buckley*, 521 U.S. 424 at 430-31 (citing cases requiring actual or threatened "immediate traumatic harm"). That is evident from the commentary upon *Restatement (Second)* section 456. Comment d states that the rule gives recovery for "*immediate* emotional disturbance accompanying the bodily harm, or following *at once* from it" in addition to pain and suffering (*i.e.*, the "subsequent emotional disturbance brought about by the bodily harm itself"). *Id.* § 456 cmt. d (emphasis added). The lone example in the Restatement of emotional injury recoverable under the physical impact rule is fright in anticipation of immediate trauma. *Id.* § 456 cmt. e. ("one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him"). Indeed, when pain and suffering (which need not arise immediately, *id.* § 456 cmt. d) is excluded, the "fright, shock, or other emotional ... disturbance" compensable under section 456(a) is the same as the "fright, shock, or other immediate emotional disturbance" compensable under section 436(2) when there is only a risk of

physical injury. *Id.* § 436(2). "[T]he emotional disturbance must be the immediate result of the actor's negligent conduct," and "[s]ubsequent brooding over the actor's misconduct or the danger in which it had put the other is not enough to make the negligent actor liable for an illness so brought on." *Id.* § 436 cmt. c.[2] See Pet'r Br. 20-22.

Because respondents cannot satisfy the immediacy requirement of the common law, respondents seek a dramatic extension of the physical impact rule, not the application of settled tort principles, as they claim. See *Nutt* v. *A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983) (the "nature of the asbestos related injury ... is clearly incompatible with the traumatic event requirement for recovery of mental anguish"), *aff'd*, 480 A.2d 647 (Del. 1984). Petitioner's failure to warn of the dangers of asbestos in the 1940s to 1970s was not a harrowing experience for respondents that struck fear in their hearts. Respondents are not claiming fright experienced from dangerous conduct, but rather concern about cancer from asbestos exposure, JA 116-17, 255, 277, 298-99, 331-32, appearing decades after the conduct. That apprehension is based only on after-acquired information and perceived

[2] It has never been the rule that any physical injury caused by a defendant's negligence permits unfettered recovery of all emotional distress connected to the conduct. Thus, in *McMahon* v. *Bergeson*, an accident case where the emotional distress did not arise from the physical injury or from the collision itself, the court denied recovery even though "[t]here is no question that the plaintiff did suffer physical injury"; the court held that "the same rule of damages [must] be applied as in the cases in which recovery is allowed for emotional distress alone." 101 N.W.2d 63, 71-72 (Wis. 1960). Indeed, respondents' proposed rule—that any physical injury, no matter how remote in time, permits recovery of all emotional injury causally linked to the defendant's negligence—would swallow *Gottshall*'s zone-of-danger rule, as a number of courts have ruled. *See Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171-72 (10th Cir. 2000); *Szymanski* v. *Columbia Transp. Co.*, 154 F.3d 591, 594 (6th Cir. 1998) (rejecting argument that Jones Act plaintiff's non-immediate heart attack made *Gottshall*'s zone-of-danger test inapplicable); *Capriotti* v. *Consol. Rail Corp.*, 878 F. Supp. 429, 432-33 (N.D.N.Y. 1995) (same for exacerbation of heart condition).

statistical risks of contracting distinct diseases (lung cancer and mesothelioma) based on extrapolations from risk-factor studies of unrelated occupational groups. Indeed, respondents' proposed rule is boundless. If the physical impact rule applied beyond immediate trauma, *any* asbestos-related physical injury—such as asbestos pleural disease, *cf. Sheppard* v. *A.C. & S. Co.*, 498 A.2d 1126, 1128 n.3 (Del. Super. Ct. 1985), *aff'd*, 503 A.2d 192 (Del. 1986)—would open the door for unrestricted jury discretion in awarding fear-of-cancer damages. Even more absurdly, because section 456(a) allows recovery for "pre-impact fright," *Beynon*, 718 A.2d at 1184-85; *Restatement (Second)* § 456 cmt. e, respondents' proposed rule would allow a plaintiff who develops any asbestos disease to recover decades worth of "fear of cancer" dating back to exposure—the very recovery denied in *Buckley*. Asbestosis does not materially distinguish respondents from heavily exposed plaintiffs like the one in *Buckley*, 521 U.S. at 427. Such plaintiffs have a certain risk of asbestosis and lung cancer, *id.*; having proven asbestosis, respondents are simply claiming a different statistical risk of lung cancer.

Furthermore, the rationale for allowing recovery of emotional injury coincident with physical injury is the single-action rule. W. Hale, *Handbook on the Law of Damages* §§ 33, 40-41 (R. Cooley ed., 2d ed. 1912). Courts, however, generally have abandoned the single-action rule in asbestos cases, allowing recovery in separate lawsuits at different times for different harms. See *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 120-21 (D.C. Cir. 1982) (Ginsburg, J.). Thus, even if damages for statistically derived fear of cancer were permissible under FELA, no inexorable rule of tort law requires that such damages be awarded in an action to recover for asbestosis. "If cancer later develops, a plaintiff can bring a second action to recover for the cancer and all of the past, present and future emotional distress or mental anguish associated with the cancer, including fear of contracting cancer." *Cleveland* v. *Johns-Manville Corp.*, 690

A.2d 1146, 1150 n.10 (Pa. 1997); *Sopha* v. *Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 635 (Wis. 1999).

Given that respondents did not "contemporaneously sustain[]" both injury and fear of cancer from petitioner's conduct, *Gottshall*, 512 U.S. at 547, the physical-impact prong of *Restatement (Second)* section 456(a) is wholly inapplicable. Respondents' development of a slowly progressive disease that becomes manifest after a long latency period is not a "physical impact." Nor were respondents at "immediate risk" of physical impact. 512 U.S. at 547-48. Thus, fear-of-cancer claims are not compensable as pain and suffering "resulting from the bodily harm" of asbestosis, *Restatement (Second)* § 456(a), or under the independent tort of negligent infliction of emotional distress. But even if this Court were to expand the concept of "zone of danger" to fears of a disease for which the physical injury is a statistical risk factor, respondents still could not recover. Under the zone of danger test, even FELA plaintiffs with asbestosis must show physical or other objective manifestations of severe emotional distress. *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1342 n.1, 1348 (11th Cir. 2002); Pet'r Br. 26-31; U.S. Br. 23-26.

Respondents' proposed broadening of the physical impact rule to encompass statistical-risk fears is particularly unwarranted given the nature of asbestos litigation and the underlying epidemiology. Respondents understandably do not confront the shaky foundations of their claims, and their *amici* mischaracterize petitioner's arguments. Petitioner does not dispute that asbestosis can be "a clinically serious, often disabling, and progressive disease." APHA Br. 3-4. Rather, petitioner has made the uncontroversial point that "[t]here may be great difficulty ... in diagnosing the disease in its early stages." R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); Pet'r Br. 3-5. The ATS guidelines themselves warn of the substantial risk of diagnostic error when there are partial and mild symptoms, for the markers of asbestosis are not specific to the disease.

Resp'ts Br. A7, A14-21. These uncertainties are exploited in litigation, and few claimants are found to have asbestosis when subject to independent medical scrutiny.[3]

Respondents here claimed "mixed dust pneumoconiosis" or asbestosis, *e.g.*, JA 224-25, 194, 200, based on partial, mild and disputable symptoms with many possible causes. The diagnosis of asbestosis depended almost entirely on the respondent's subjective account of his exposure. Indeed, respondents' expert found such a condition even when the x-ray evidence was *inconsistent* with asbestosis, solely because a respondent said that he had asbestos exposure. Pet'r Br. 7. Even if such uncertain proof is enough to sustain a liability verdict for physical injury, it militates strongly against the broad expansion of the physical impact rule respondents seek.

The epidemiology also does not support this expanded recovery. Petitioner has never contended that "a diagnosis of asbestosis is irrelevant to any asbestos-related increased risk

[3] R. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. Occ. Med., 1088, 1089 (1990); C. Rubin & L. Ringenbach, *The Use of Court Experts In Asbestos Litigation*, 137 F.R.D. 35, 39-40 (1991). Such claims are proliferating against railroads far beyond any reasonable expectation. Because asymptomatic pleural plaques do not constitute physical injury, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 236-38 (Pa. 1996), and thus are not actionable under FELA, 45 U.S.C. § 51, FELA plaintiffs without pleural disease who allege asbestos-related injury generally must at least prove asbestosis to prevail. The federal government reports only 8 asbestosis deaths per year (1987-1996) among workers whose principal occupation was railroad worker; the proportionate mortality ratio of railroad workers from asbestosis (versus a standard population) is only 2.8, compared to 192 among insulation workers, 34 for shipbuilders, and 20 for plumbers and pipefitters. National Inst. for Occupational Safety & Health, *Work-Related Lung Disease Surveillance Report* 20-22 tbls. 1.8, 1.9 (1999). Although this data is incomplete and does not capture nonfatal asbestosis, it suggests a comparatively low incidence of asbestosis (and certainly serious asbestosis) among railway workers. Yet over 5,500 asbestos-injury claims have been filed in West Virginia alone against railroads that have operated in that state. Brief of *Amicus Curiae* Association of American Railroads, at 2, *Mobil Corp.* v. *Adkins*, No. 02-132 (U.S. filed Aug. 28, 2002).

of cancer and that an increased risk is actually speculative, controversial and uncertain." APHA Br. 12. Petitioner's point is that the epidemiological risk determinations, based on studies of heavily exposed asbestos workers from different occupations, cannot validly support any quantification of the cancer risks of railway workers, asbestotic or not, and fear-of-cancer claims, which are inevitably based on such studies, should not be cognizable under FELA.

Respondents blithely assert as a categorical truth that "10 percent of individuals with asbestosis contract mesothelioma[,] [and] 39 percent of those with asbestosis who also smoke contract fatal lung cancer, while the rate for nonsmokers with asbestosis is 2-5 percent." Resp'ts Br. 20. There is absolutely no scientific basis for generalizing these results to respondents, or indeed, any railway worker. The cited study reports the cause of death for certain heavily exposed British workers (largely insulation workers) who had previously been certified by Pneumoconiosis Medical Panels as having disabling asbestosis; the extent of disability was the leading predictor of cancer mortality. G. Berry, *Mortality of Workers Certified by Pneumoconiosis Medical Panels As Having Asbestosis*, 38 Brit. J. Indus. Med. 130, 135 (1981). Asbestosis is not regarded as a risk factor for mesothelioma, which is not a lung-tissue cancer. See J. Hughes & H. Weill, *Asbestosis As a Precursor of Asbestos Related Lung Cancer*, 48 Brit. J. Indus. Med. 229, 229 (1991).

Moreover, respondents' claim violates the basic tenet that risk estimates from a cohort study cannot safely be extrapolated to individuals in different populations with different exposures that will affect population risk. See D. Kaye & D. Freedman, *Reference Guide on Statistics* 96 & n.38, *in Reference Manual on Scientific Evidence* (2d ed. 2000). The definitive studies in the field (unquestioned by respondents and their *amici*) show a wide variance in cancer risks across different occupational groups, Pet'r Br. 23-24 & n.18, and there is no basis for the claim that railway workers

face the same risks as more heavily exposed insulation workers, asbestos factory workers, and asbestos miners. F. Liddell & J. McDonald, *Radiological Findings as Predictors of Mortality in Quebec Asbestos Workers*, 37 Brit. J. Indus. Med. 257, 266 (1980) ("These conclusions may not apply to other types of asbestos fibre or industrial exposure where the risks of cancer, relative to fibrosis, differ ...."). [4] Notably, the studies (ignored by respondents and their *amici*) that have systematically assessed lung cancer rates among railroad workers have found no overall increased risk of this cancer. [5]

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[4] *See* D. Henderson et al., *Asbestos And Lung Cancer: Is It Attributable to Asbestosis or to Asbestos Fiber Burden, in Pathology of Lung Cancer* 83, 83 (B. Corrin ed. 1997) (discussing studies and noting that lung cancer risk "appears to increase with the severity of the pulmonary fibrosis and hence with the inhaled dose of asbestos") (footnotes omitted). Aside from the extrapolation error, it is a fallacy to claim that testimony that respondents have "mixed dust pneumoconiosis" or asbestosis means that all asbestotic study results apply to them and provide a basis for quantification of their personal risk (which is the critical question, given the high background rates of cancer in the general American population, Pet'r Br. 23). In some studies, the determinations were based on tissue analyses from autopsies. G. Sluis-Cremer & B. Bezuidenhout, *Relations Between Asbestosis and Bronchial Cancer in Amphibole Asbestos Miners*, 46 Brit. J. Indus. Med. 537, 537 (1991); R. Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 Brit. J. Indus. Med. 81, 81 (1955). Moreover, the studies that are based on systematic, disinterested x-ray readings report excess cancer risks for the *entire* study subpopulation with x-ray abnormalities, which are often dominated by individuals with high degrees of abnormality. *See, e.g.*, H. Kipen, *Pulmonary Fibrosis in Asbestos Insulation Workers with Lung Cancer: A Radiological and Histopathological Evaluation*, 44 Brit. J. Indus. Med. 96, 97-99 (1987); W. Cookson et al., *Compensation, Radiographic Changes, and Survival in Applicants for Asbestosis Compensation*, 42 Brit. J. Indus. Med. 461, 464 (1985); Liddell & McDonald, *supra*, at 264. Those risk calculations *do not* represent the actual risks of the respondents with the slightest x-ray abnormalities (1/0 and 1/1 ratings). Moreover, even deriving individual risk estimates from reported "relative risk" in such studies is unwarranted. *See* G. Taubes, *Epidemiology Faces Its Limits*, Science, July 1995, at 164; Kaye & Freedman, *supra*, at 96 n.38.

[5] Pet'r Br. 23-24 & n.18. Respondents' emphasis on asbestos exposure during locomotive overhaul, Resp'ts Br. 1-2, is ironic. None of them ever

The risks of railway workers with mild mixed-dust pneumoconiosis or asbestosis are not known. In any event, the epidemiological studies of asbestotics do not create jury questions as to the reasonableness of a particular plaintiff's fear, as respondents claim. All FELA fear-of-cancer claims are necessarily based solely on risk extrapolations from these studies, however summarily conveyed to the plaintiff by a lawyer or more rarely a doctor. It is for this Court to decide as a matter of law whether the physical impact rule should be extended to allow fear-of-cancer damages on such bases.

This Court looks to the damages rule that is most consonant with FELA. *Monessen S.W. Ry.* v. *Morgan*, 486 U.S. 330, 337-39 (1988) (denying prejudgment interest damages); *Mich. Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 73-74 (1913) (denying loss of consortium damages); *Buckley*, 521 U.S. at 444 (denying lump-sum medical monitoring damages). In so doing, this Court "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create." 521 U.S. at 438. Here, the Court must also bear in mind that "[t]ranslating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement." McCormick, *supra*, § 88, at 318. Given the rapid acceleration of asbestos claims, allowing juries unrestricted power to award emotional damages for the specter of deadly cancer plaintiffs may never contract would create just the "unlimited and unpredictable liability" the law has always resisted, *Gottshall*, 512 U.S. at 557, and "diminish the likelihood of recovery by those who later suffer from the disease," *Buckley*, 521 U.S. at 435-36.

It is clear that "fear of cancer" based on statistical risk factors is not compensable under traditional common law

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worked in central overhaul facilities, and only one was "directly involved" in stripping or applying asbestos to steam engines for a short time. *Id.* at 5 n.3; JA 360-64. The others principally predicate their claim on occasionally working in or around roundhouses (like vast numbers of rail workers) where they claimed sporadic exposure. Resp'ts Br. 5 n.3.

principles and should not be compensable under FELA. This Court should not eliminate the immediacy requirement from the physical-impact rule, and should not allow any cancer-related distress damages unless the plaintiff has cancer. *Cleveland*, 690 A.2d at 1150 n.10. Alternatively, this Court should adopt the rule that an asbestotic may not recover for fear of cancer unless it is more probable than not that cancer will develop. *Watson* v. *Norfolk & W. Ry.*, 507 N.E.2d 468, 471-72 (Ohio Ct. App. 1987) (FELA). Other courts have adopted this rule when the fear is predicated on exposure which, like asbestosis, is similarly just a risk factor for cancer.[6] Respondents cannot make this showing. JA 573; Resp'ts Br. 8. Finally, because the claimed damages are novel and the risk of error is high, if this Court were to allow their recovery, it should do so only upon the traditional showing of severe emotional injury corroborated by physical or other objective manifestations. Pet'r Br. 16-31. Respondents also cannot make this showing. *Id.* at 8-9, 31. In all events, this Court should not grant juries the ruinous and unbounded power to award massive verdicts for cancer fears on the kind of evidence presented by these respondents.

2. Section 1 of FELA provides that "[e]very common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person *suffering injury while he is employed by such carrier in such commerce*." 45 U.S.C. § 51 (emphasis added). Where there are independent causes outside of railroad employment of a plaintiff's injury, the injury must be apportioned by causal contribution on any practicable basis, and the railroad may be held liable only for the injury it caused. That was the common-law rule at the time of FELA's enactment, Pet'r Br. 35-39, and it is the rule now, *id.* at 40-42.

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[6] *Potter*, 863 P.2d at 816; *Doner* v. *Ed Adams Contacting., Inc.*, 617 N.Y.S.2d 565, 565 (N.Y. App. Div. 1994); *Barron*, 868 F. Supp. at 1212; AIA Br. 20-24.

Respondents argue that the common law in 1908 was muddled, quoting Judge Cooley to claim that there was "'considerable difference of opinion' in 1908 concerning the precise scope of joint and several liability." Resp'ts Br. 41. But Cooley was discussing the judicial divide over whether joint and several liability was limited to actors in concert or with common design or duty, or extended to circumstances "where the negligences of two or more persons concur in producing a single, indivisible injury." 1 T. Cooley, *A Treatise on the Law of Torts* 247 (J. Lewis ed., 3d ed. 1906). Petitioner has acknowledged that several liability was not the rule in 1908 for concurrent tortfeasors causing indivisible injury, Pet'r Br. 35-36 & n.29, but this is not such a case. Our position is that "the dominant rule" of the common law in 1908 was "several liability, where an injury was caused by successive independent causes." *Id.* at 32. Respondents and their *amici* do not muster a single case to the contrary. Prosser confirms that this was the prevailing and just rule at common law:

> The injuries inflicted may be severable in point of time. If two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused separate damage, limited in time, and that neither has any responsibility for the acts of the other. *The same may be true where a workman's health is impaired through the negligence of successive employers*, or where there are successive assaults upon the plaintiff. In such cases there is available a logical basis for the apportionment of the loss .... It is possible to say, in theory at least, where one defendant's wrong left off and the other's began. As a practical matter, it may be difficult or impossible to produce satisfactory evidence as to the extent of the damages caused by each; but this is no sufficient reason for holding a defendant liable for damages with which he had no connection.

W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 434-35 (1937) (emphasis added and footnotes omitted).[7]

In *McGannon* v. *Chicago & Northwest Railway*, recognized by Prosser and others as a leading case demonstrative of the general rule,[8] the Minnesota Supreme Court refused to hold successive railroad employers jointly liable for a worker's cumulative lung injury suffered from the inhalation of fine dusts during the course of his employment with each. 199 N.W. 894, 894 (Minn. 1924). *Amici* "American Law Professors" note that *McGannon* is a joinder case, and claim that Petitioner (and presumably Prosser) have "confus[ed]" the concepts of joint and several liability and joinder. Profs. Br. 3-4 & n.1. The confusion is theirs. Petitioner has never contended that joint and several liability was coextensive with joinder; it argued the converse, which is true, that there could be no joinder if liability were not joint. Pet'r Br. 37. *McGannon*, distinguishing concurrent tortfeasor cases, expressly holds that there is no joinder because there is no liability for the successive negligence of another.[9] Regardless

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[7] Cooley himself recognized that in the cases most analogous here—where multiple tortfeasors separately release pollution—their actions are to be treated separately, and damages must be apportioned between them. Cooley, *supra*, at 250-52 & n.25. Respondents rely on cases that apply joint and several liability where there are "successive" tortfeasors in a single chain of events leading to injury (typically collision cases). Resp'ts Br. 41 & n.25; Profs. Br. 9-11. However, as Prosser states, these are subject to a different rule than successive torts severable in time. Prosser, *Joint Torts*, at 432-33; *see also Restatement (Second)* § 433A cmt. i.

[8] Prosser, *Joint Torts*, at 434 n.139; R. Jackson, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 419-20 & n.91 (1939); G. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. Dayton L. Rev. 267, 282 (1996) (the "classic cases" for apportioning harms by severability in time "involve separate batteries inflicted on a plaintiff or impairment of an employee's health by toxic exposure from successive employers").

[9] "The railway company could not be liable for negligence in the operation of the system during that time [the previous employment] any more than could the Director General be held liable for acts occurring subsequently while the company was in control." 199 N.W. at 894. The

of whether the tort involved injury to person or to property, courts uniformly recognized that defendants should not be held liable for harms they did not cause. Pet'r Br. 36-37; *Albrecht* v. *St. Hedwig's Roman Catholic Benevolent Soc'y*, 171 N.W. 461, 462 (Mich. 1919) (assaults separate in time do not give rise to joint liability simply "because the amount of damages done by each of the claimed assailants cannot be separated," and distinguishing concurrent tortfeasor liability). Because plaintiffs bore the burden of proving injury caused by the defendant, that often meant that the plaintiff had no recovery. *Restatement (Third) of Torts: Apportionment of Damages* § 26 cmt. h, rptr's note cmt. h (2000) ("*Restatement (Third)*"). To mitigate that burden, courts reduced the burden of production, and liberally apportioned damages based on relative causal contributions on any available evidence. Pet'r Br. 37-39 & nn.31-32; *Restatement (Second)* § 433A cmt. d, illus. 4-5; *id.* § 881 illus. 1-2.

Apportionment is also the modern rule. Harms must be apportioned when they are "divisible"—*i.e.*, when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement (Second)* § 433A(1)(b); *Restatement (Third)* § 26. In particular, modern authorities continue to recognize that harms "may be conveniently severable in point of time" and that when actors "cause[] a separate amount of harm, limited in time," then "neither has any responsibility for the harm caused by the other." *Restatement (Second)* § 433A cmt. c; 4 F. Harper et al., *The Law of Torts* § 20.3, at 122 (2d ed. 1986); W. Keeton et al., *Prosser & Keeton on the Law of Torts* § 52, at 352 (5th ed. 1984) ("*Prosser on Torts* (5th ed.)"); *Restatement (Third)*

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professors weakly try to limit *McGannon* by postulating that the court must have assumed that there were two separate injuries. Profs. Br. 4 n.1. To the contrary, the court recognized that it was a single lung injury "aggravated" by the subsequent tort. 199 N.W. at 894. *Amici* are likewise wrong that the other cases cited in petitioner's opening brief concern only joinder; they clearly concern substantive liability. *See* Pet'r Br. 35 n.28.

§ 26 rptr's note cmt. f. Divisibility is a question of fact for the jury. *Id.* cmts. f, h.

Notwithstanding these settled principles, respondents flatly proclaim a *per se* rule that asbestosis is "quintessentially an 'indivisible' personal injury under longstanding and contemporary tort principles." Resp'ts Br. 43.[10] To the contrary, courts have apportioned asbestos-related injuries, see Pet'r Br. 42 n.36, and the *Restatement (Third)* specifically discusses asbestosis cases as an example of an "enhanced-injury case" which "requires causal division between the plaintiff's original damages and the enhanced damages." *Restatement (Third)* § 26 rptr's note cmt a. Professor Boston, whose analysis is praised by the Restatement reporters, *id.*, also recognizes asbestos-related disease (including cancer) as apportionable. Boston, *supra*, at 313-14, 328-34. Respondents rely heavily on the recognition that single physical injuries may "normally" be indivisible, *Restatement (Second)* § 433A cmt. i, but that principle is neither immutable nor applicable here. It developed at common law in "single wound" cases—involving a broken leg, for instance, where there is one snap of the bone, and causal apportionment is impossible. *Id.* But "[i]n personal-injury cases, determining whether damages are indivisible or divisible depends on careful attention to the facts and the nature of the damages." *Restatement (Third)* § 26 rptr's note cmt. l.

All dose-related diseases are apportionable, and asbestosis in particular is clearly an injury capable of division by cause. As respondents admit, asbestosis is diagnosed when the cumulative scarring of the lung tissue progresses to the point where breathing functions are impaired (often approximately a third of the lung). Resp'ts Br. 2-3. The key insight is that, as respondents' expert testified, scarring occurs because of

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[10] Respondents cite only two cases in support of this proposition, one of which simply concludes that insufficient evidence was put forward in that case for damages to be divided. *Owens Corning Fiberglas Corp.* v. *Parrish*, 58 S.W.3d 467, 476-77 & n.27 (Ky. 2001).

the body's reaction to individual retained fibers that are not expelled by the lung's clearance mechanisms. Tr. III, 91-115 (Apr. 15, 1998). The lung tissue is injured "by direct action of the fiber on cells or through the mediation of factors released from activated macrophages." D. Riley, *Pulmonary Connective Tissue in Occupational Lung Disease, in Occupational Lung Disease* 1, 14-15 (J. Gee ed. 1984) (footnote omitted). Macrophages are defensive cells in the lung that attempt unsuccessfully to ingest the fiber as a foreign body (a process known as phagocytosis), stimulating a host of chemical reactions that lead to fibrosis (scarring). *Id.*; W. Parkes, *Occupational Lung Disorders* 427-29 (3d ed. 1994). While the cumulative fibrosis from all sources must progress to the point of asbestosis in order for there to be actionable "injury" under FELA, cf. *Urie* v. *Thompson*, 337 U.S. 163, 169-71 (1949) (silicosis),[11] it is clear that the railroad has only caused the scarring that occurs around the fibers retained from the railroad exposure. The railroad has not caused the scarring caused by the fibers that were deposited in Butler's lungs from his thirty-three years as a pipefitter, or in the decades Ayers spent as an auto mechanic. Because the railroad has "caused a separate amount of harm, limited in time," it has no "responsibility for the harm caused by the other." *Restatement (Second)* § 433A cmt. c. To be sure, the fibers and the scarring from railroad exposure cannot be observed, no more than can the effects of separate pollution in a toxic lake. But that is "no sufficient reason for holding a defendant liable for damages with which he had no connection." Prosser, *Joint Torts* at 434-35.

The record below clearly provides "a factual basis ... for some rough practical apportionment," which is all the common law has ever demanded. *Prosser on Torts* § 52, at

[11] Contrary to the claims of respondents' *amici*, *Urie* concerns only the accrual of injury for purposes of the statute of limitations, and says nothing about divisibility. 337 U.S. at 169-71.

345 (5th ed.); Pet'r Br. 39-45.[12] Respondents' intimation that petitioner did not create an adequate record or properly raise the issue is baseless. Resp'ts Br. 45-46. Petitioner cross-examined Butler and Ayers at length not only about their time of outside employment, but also about the nature of their asbestos exposures there, which the jury would have been free to consider. JA 256-61, 274-75; see also *id.* at 182-83, 201-05. Petitioner filed motions on apportionment, and proposed jury instructions and verdict forms permitting the jury to apportion between railroad and outside employment; the court denied these requests and instructed the jury not to consider nonrailroad exposures. *Id.* at 526-38, 539, 549-60, 568-70.

Nothing supports respondents' claims that petitioner had to provide evidence from outside employment of factors that have been scientifically found to be correlated with asbestos injury, such as fiber type or intensity or duration of exposure. Resp'ts Br. 46. Indeed, courts have not held the plaintiff to such proof in establishing causation. Apportionment has never required greater proof than causation, and Prosser notes that "courts necessarily have been very liberal in awarding damages where the uncertainty as to their extent results from the nature of the wrong itself," Prosser, *Joint Torts* at 438-39:

> All of these cases point rather definitely to the conclusion that the test of entire liability is the absence of any logical basis for apportionment of the damages. If any such basis exists, and the court can say definitely that separate portions of the loss are to be attributed to each individual defendant, then neither is liable for what the other has caused. Difficulty of proof does not impose liability upon either, but it is met to some extent by giving the jury a comparatively free hand.

[12] *See also Restatement (Third)* § 26 rptr's note cmt. h, at 333-34; *Prosser on Torts* § 52, at 350 (5th ed.) ("The difficulty of any complete and exact proof ... has not been regarded as sufficient justification for entire liability."); Hale, *supra*, § 31, at 100; Pet'r Br. 36-39 & nn.31-32.

Id. at 439. The evidence here was more than sufficient to permit apportionment. Indeed, respondents' counsel acknowledged that it was "common sense" that time of exposure is correlated with relative contribution to disease. *Id.* at 476. Respondents' expert testified on that basis that Butler's railroad exposure was a "minimal factor" in the development of his disease, and that Ayers' railroad and outside exposures were "equivalent" in their heaviness and significance. JA 195, 205, 228, 236-37. A jury could also consider, for example, that Butler's asbestosis risks were greatly increased by his work as a pipefitter. *Supra* n.3. The trial court erred in not permitting apportionment by cause.

3. Respondents alternatively contend that this Court's causation decisions in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), and *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), somehow abrogate the doctrine of apportionment. Resp'ts Br. 34-36. They did nothing of the kind. The longstanding rule of causation under FELA before and after those decisions is proximate cause. *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949) ("We made clear in *Coray* ... that if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff.").[13] As respondents recognize, *Rogers* "reversed a state court ruling that had construed FELA to impose a test of causation under which the railroad defendant's negligence had to be 'the sole, efficient, producing cause of injury.'" Resp'ts Br. 34. Relying on FELA's "in whole or in part" language, 45 U.S.C. § 51, *Rogers* held that "the test of a jury case is simply whether ...

[13] *See also Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943); 2 M. Roberts, *Federal Liability of Carriers* § 871, at 1698-1701 & n.9; *id.* § 872, at 1705 & nn.15-16 (1929) (citing cases). To remove the common-law requirement of proximate cause would render FELA a workers' compensation scheme (a result that this Court has rejected, *Buckley*, 521 U.S. at 429), and would lead to absurd results—rendering a railroad liable for an employee's entire asbestos-related damages if the employee had one day of railroad exposure.

employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506; 2 Roberts, *supra*, § 873, at 1706 ("in whole or in part" "means only that the negligent act charged to the carrier must be one of the proximate causes of the injury"). *Coray* and *Rogers* establish a "relaxed standard of causation," *Gottshall*, 512 U.S. at 543, that prevents courts from removing cases from juries based on restrictive rules of proximate causation.[14] But a jury still must find the essential element of any proximate cause rule: *i.e.*, that the railroad's negligent exposure of the plaintiff to asbestos was a "substantial factor" in his development of disease. *Restatement (Second)* § 431(a); Pet'r Br. 48 n.45.

Regardless, the rule for establishing legal causation does not affect apportionment. Legal causation is established, *Restatement (Second)* §§ 431-433, then the injury is apportioned among causes, *id.* § 433A. Indeed, respondents concede that *Rogers* does not address the scope of damages recoverable against the railroad. Resp'ts Br. 35. Respondents make the puzzling claim that there is a "virtual absence in almost a century of FELA litigation" of any decision apportioning injury by cause. *Id.* at 36. But apportionment has always been applied under FELA, for example, to pre-existing conditions. Pet'r Br. 34; *Restatement (Second)* § 433A cmt. e. Indeed, respondents' own *amicus* concedes that damages should be apportioned here on the same principle. UTU Br. 4-5. Finally, as a matter of text, apportionment is driven by the limitation that a railroad employer is liable only for injuries that an employee suffers "while he is employed by such carrier." 45 U.S.C. § 51. A railroad is liable only for damages arising from railroad employment that its negligence caused, and not for damages suffered by an employee outside

[14] Indeed, it is this disjunction of the rules under federal and state law that undermines respondents' claim that contribution actions under state law are an adequate substitute for apportionment. *See* Pet'r Br. 47.

of railroad employment.[15] Thus, where there are multiple causes, a plaintiff must prove that the railroad exposure was a "substantial factor" in causing asbestos-related injury: *i.e.*, that the railroad's negligence was "sufficient to bring about harm to another." *Restatement (Second)* §§ 431(a), 432, 433. If it is, then the harm must still be apportioned among all causes, innocent or tortious, on any "reasonable basis." *Id.* § 433A(1)(b); *Restatement (Third)* § 26.

Finally, to the extent respondents' injuries are attributable to railroad employment, damages also should be apportioned by fault relative to the asbestos manufacturers, who bear the principal responsibility even for railroad injury. JA 131. This Court should not adhere to a rule of pure joint and several liability that has been abandoned in all but 14 states. Pet'r Br. 42-43. In an age where the progress of the common law is dominated by statutes, G. Calabresi, *A Common Law for Our Age of Statutes* (1982), nothing prohibits this Court from taking legislative changes into account, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 389-92 (1970). Comparative fault must already be determined relative to plaintiffs, 45 U.S.C. § 53, and to settling joint tortfeasors, *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202 (1994), and nothing in FELA prevents the Court from adopting similar principles as to liability. The jury should have been instructed to apportion damages on this basis as well.

CONCLUSION

The judgments of the Circuit Court should be vacated and the cases remanded for a new trial.

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[15] *See* 42 Cong. Rec. 4536 (1908) (Remarks of Sen. Heyburn) ("Of course it is obvious that the committee in both the House and the Senate intended that the injury should result from the employment, and not the injuries that might result from some cause entirely outside of the employment. In other words, it was not intended that the employer should insure the safety of the employee against outside attack or the result of injuries from some cause not included in the employment.").

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No. 01-963

In the Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
PETITIONER

v.

FREEMAN AYERS, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The brief of the United States will address the following question:

Whether the court below erred in awarding damages for emotional distress under the Federal Employers' Liability Act (FELA) to plaintiffs based on an asserted fear of developing asbestos-related cancer, where plaintiffs have not actually developed cancer or any symptoms related to cancer and presented no evidence of any corroborating physical manifestation of their emotional injury.

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WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents important questions arising under the Federal Employers' Liability Act (FELA) that involve the interpretation of evolving principles of federal common law concerning limitations on emotional distress damages. The United States has a substantial interest in the resolution of those questions because the Court's disposition of this case may impact the government's liability under federal statutes, most notably the Jones Act, 46 U.S.C. App. 688, which "adopts 'the entire judicially developed doctrine of liability' under [FELA]," *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958), and general maritime law, see, *e.g.*, *White* v. *Mercury Marine, Div. of Brunswick*,

Inc., 129 F.3d 1428, 1432 (11th Cir. 1997) (noting the relevance of federal-law precedents in determining scope of liability in federal admiralty law). The Court's decision in this case may also substantially affect the government's liability in cases under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, particularly in toxic-tort claims against the government. Although FTCA claims are based on state rather than federal law, courts have looked to FELA cases in determining when injuries accrue under the FTCA, see, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 121 n.7 (1979) (noting several courts of appeals had applied the accrual approach adopted under FELA in *Urie* v. *Thompson*, 337 U.S. 163 (1949), to FTCA cases), and, more broadly, have looked to this Court's FELA decisions in assessing liability under state law. See, *e.g.*, *Fulmore* v. *CSX Transp., Inc.*, 557 S.E.2d 64, 75 (Ga. Ct. App. 2001) (rejecting "fear of cancer" claim under FELA and state law where evidence only established asbestosis, because "[u]nder Georgia law, and the United States Supreme Court's ruling in [*Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424 (1997)], a plaintiff may not recover for emotional distress arising from a fear of contracting a disease until he begins to manifest symptoms of the disease") *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W.2d 88, 92-93 (Tex. 1999) (relying in part on *Buckley* to deny recovery under state law for emotional distress damages from mere exposure to asbestos); *Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 830-831 (Ala. 2001) (relying on *Buckley* in rejecting medical monitoring claim under state law in the absence of injury or illness). In addition, the government has a general concern for the proper application of tort law principles under federal common law and for the proper application of FELA.

STATEMENT

1. Respondents, six retired employees of petitioner Norfolk & Western Railway Company, brought this action under FELA in West Virginia state court. They alleged that the railroad negligently failed to provide them with a reasonably safe workplace and thereby caused their exposure to asbestos and other dusts. As part of their damages, respondents sought recovery for emotional distress based upon their concern that their exposure to asbestos might cause them to contract cancer in the future.

At trial, the parties contested whether the railroad had been negligent and whether respondents had sustained an asbestos-related health condition. See J.A. 430-31, 449. There was also evidence that several of the respondents had been exposed to asbestos over extended time periods while working for other employers. See, *e.g.*, J.A. 257-259 (respondent Butler), 236-237 (respondent Ayers).

Petitioner also contested whether the respondents had suffered any compensable emotional distress based upon a fear of developing cancer in the future. In support of their claim for such damages, some of respondents testified that they were concerned about developing cancer based on their exposure to asbestos. No respondent testified that he sustained severe emotional distress or fear or that he had experienced any physical harm resulting from cancer-related concerns. See, *e.g.*, J.A. 277 (respondent Ayers), 298-299 (respondent Shirley), 255 (respondent Butler), 116-117 (respondent Vance), 332 (respondent Johnson).

The trial court instructed the jury that it could not "award damages * * * for cancer or for any increased risk of cancer" because no respondent presented evi-

dence that he "has cancer or that he will, with reasonable certainty develop cancer in the future." J.A. 573. Nevertheless, the court instructed the jury that it was free to award damages for fear of cancer:

> You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering.

Ibid. The jury returned a verdict in favor of respondents and awarded them a collective sum of $5,810,606 against the railroad. *Id.* at 486-508.

2. The trial court upheld the jury's verdict and entered an order for respondents on February 14, 2001. Petitioner sought discretionary review by the West Virginia Supreme Court, but its petition for review was denied without comment on October 4, 2001.

SUMMARY OF ARGUMENT

Respondents in this case, former railroad workers who were exposed to asbestos dust while employed by petitioner, were awarded substantial emotional distress damages based on an asserted (and unsubstantiated) concern that they might develop cancer at some point in the future. Although there was evidence that respondents had developed "asbestosis (or, in any event, some 'occupational pneumoconios[is]')," Br. in Opp. 21, a distinct and less threatening disease caused by exposure to asbestos than cancer, it is undisputed that *none* of

the respondents has cancer or has developed any symptoms related to cancer. See J.A. 573.

Under both established common-law principles and this Court's decisions in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), respondents cannot recover emotional distress damages under FELA for the mere fear of developing cancer in the future. FELA permits recovery for emotional injuries associated with physical injuries actually suffered, but not for the anxiety associated with future injuries that the plaintiff may or may not suffer. Asbestosis, the only disease respondents claim to have at this time, is a distinct and entirely separate disease from cancer, and although both may stem from the same exposure to asbestos, asbestosis is not causally linked to cancer and does not evolve into cancer. Accordingly, any increased risk of cancer or associated fear is not related to the physical injury that permits respondents to sue. This does not mean that respondents cannot recover their damages, including emotional distress damages, in the event they develop cancer. Under established common law principles, a party can recover for any emotional injuries related to cancer in a separate action brought after the cancer actually develops. In other words, as in *Buckley*, the question is not *whether* damages for fear of cancer may be recovered, but *when*. And recovery for such damages in this suit, as in *Buckley*, is premature.

In addition, "fear" experienced long after the exposure based on what this Court has characterized as "controversial and uncertain" statistical information fails to satisfy the common law's requirements that emotional harm, to be recoverable, must be both "severe" and the result of "immediate trauma." Moreover,

at a minimum, any such fear would have to satisfy the common law's requirement that only severe emotional injuries with some corroborating physical manifestation (which respondents did not prove at trial) may be recoverable. Accordingly, the state court judgment awarding damages for respondents' asserted cancer-related fears should be reversed.[1]

ARGUMENT

RESPONDENTS MAY NOT RECOVER UNDER FELA FOR THEIR ASSERTED FEAR OF DEVELOPING CANCER IN THE FUTURE

Section 1 of FELA provides that every common carrier by railroad that engages in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. 51. Congress enacted FELA in 1908 to "shift[] part of the 'human overhead' of doing business from employees to their employers," *Gottshall*, 512 U.S. at 542 (quoting *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943)), and thus in enacting the statute Congress was "focused primarily upon injuries and death resulting from accidents on interstate railroads," *ibid.* (quoting *Urie* v.

[1] The United States will not address the second question on which the Court granted certiorari concerning whether apportionment or joint and several liability is proper under FELA. It notes, however, that the Court's resolution of that question in the FELA context need not apply to other federal statutes, such as CERCLA, where both the structure and purposes of the underlying statutory scheme may differ substantially from those of FELA in ways that may be directly relevant to the propriety of joint and several liability.

Thompson, 337 U.S. 163, 181 (1949)). In furtherance of those "humanitarian" purposes, "Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Ibid.* Most notably, FELA "abolished the fellow servant rule"; "rejected the doctrine of contributory negligence in favor of * * * comparative negligence"; "prohibited employers from exempting themselves from FELA through contract"; and, after a 1939 amendment, "abolished the assumption of risk defense." *Id.* at 542-543; see 45 U.S.C. 51, 53- 55.

"Only to the extent of these explicit statutory alterations," however, "is FELA 'an avowed departure from the rules of the common law." *Gottshall*, 512 U.S. at 544 (quoting *Sinkler* v. *Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958)). Thus, "unless [common-law principles] are expressly rejected in the text of the statute, they are entitled to great weight in [the Court's] analysis." *Ibid.*; see also *ibid.* ("Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision."); *id.* at 551 ("[B]ecause negligent infliction of emotional distress is not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid inflicting emotional injury."). Accordingly, notwithstanding FELA's general humanitarian purposes, Congress did not intend FELA to be "a workers' compensation statute," *id.* at 543, and FELA "does not make the employer the insurer of the safety of his employees while they are on duty," *ibid.* (quoting *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649, 653 (1947)); see *St. Louis S.W. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985).

A. FELA Does Not Allow Recovery Of Damages For Emotional Distress Stemming From The Mere "Fear" of Developing Cancer

1. This Court's Precedents Limit The Availability Of Emotional Distress Damages Under FELA

In *Gottshall*, this Court addressed whether (and if so, under what standard) recovery for negligent infliction of emotional distress is available under FELA. After finding the text of the statute silent on the question, the Court reviewed the common law rules governing recovery for negligently inflicted emotional distress, with particular emphasis on the common-law rules that existed in 1908, when FELA was enacted. See 512 U.S. at 546-548, 554-556. The Court emphasized that, because "recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants," courts have placed "substantial limitations" both on "the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id.* at 546 (citing authorities).

The Court in *Gottshall* concluded that emotional distress damages were available under FELA. But it held that the common law "zone of danger" test, which limits emotional injury to those plaintiffs who either sustain a contemporaneous physical impact as a consequence of a defendant's negligence or "are placed in immediate risk of physical harm by that conduct," 512 U.S. at 547-548, "best reconciles the concerns of the common law with the principles underlying [the Court's] FELA jurisprudence," *id.* at 554. The Court reasoned that the zone of danger test "is consistent with FELA's central focus on *physical* perils," because it permits railroad employees "to recover for injuries—physical and emotional

—caused by the negligent conduct of their employers *that threatens them imminently with physical impact.*" *Id.* at 555, 556 (emphases added). Thus, the Court concluded, the rule "will further Congress' goal in enacting the statute of alleviating the physical dangers of railroading." *Id.* at 556. The Court identified three "policy grounds" that led common-law courts to adopt the zone of interest test—namely, "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 557. The Court found these policy grounds "well founded" and sufficient to limit the scope of emotional distress damages under FELA. *Ibid.*

This Court further clarified the limitations on emotional distress claims under FELA in *Metro-North Commuter Railroad* v. *Buckley*, where it held that a railroad employee negligently exposed to asbestos but without symptoms of any disease could not recover under FELA for negligently inflicted emotional distress, including damages for fear of cancer. 521 U.S. at 427, 430. In evaluating facts substantially similar to those here, the Court concluded that the zone of danger test's "physical impact" requirement is not satisfied by "simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk." *Id.* at 430; *id.* at 432 (*Gottshall*'s language and cited precedent "indicate that the words 'physical impact' * * * do not include a contact that amounts to no more than an exposure * * * to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.").

The Court emphasized that *Gottshall* had "cited many state cases in support of its adoption of the 'zone of danger' test," each of which "involved *a threatened physical contact that caused, or might have caused, immediate traumatic harm.*" 521 U.S. at 430 (emphasis added). Moreover, the *Gottshall* Court repeatedly explained that its adoption of the zone of interest test was based in part on the appropriateness of limiting recovery to damages closely tied to immediate physical harms. *Id.* at 431-433 (quoting, *inter alia*, *Gottshall*, 512 U.S. at 555 ("zone of danger test * * * is consistent with FELA's central focus on physical perils"); *id.* at 556 (employer should be liable for "emotional injury caused by the apprehension of physical impact")). And while *Buckley* recognized that many courts "permit a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress," the Court also noted that those courts generally reject recovery for plaintiffs who "are disease and symptom free." *Id.* at 432 (emphasis added; citing cases).

In addition, the *Buckley* Court held that the three "general policy reasons to which *Gottshall* referred" all counseled against allowing recovery for the fear of cancer associated with mere exposure to asbestos. 521 U.S. at 433. In particular, the Court pointed to the "special 'difficult[y] for judges and juries' in separating valid, important claims from those that are invalid or 'trivial'"; "a threat of 'unlimited and unpredictable liability'"; and "the 'potential for a flood' of comparatively unimportant, or 'trivial,' claims." *Ibid.* (quoting *Gottshall*, 512 U.S. at 557).

The Court's reasoning in *Gottshall* and *Buckley* precludes recovery of emotional distress damages under FELA for the mere fear of contracting cancer, absent any evidence that the plaintiff has developed cancer or

a symptom related to cancer. *Buckley*, in particular, makes clear that fear of developing cancer in the future does not justify the recovery of emotional injury damages for that present fear. This case differs from *Buckley* only in that respondents here put forward some medical evidence, which the jury apparently credited, that in addition to being exposed to asbestos they had developed *asbestosis*. For several reasons, however, that distinction does not permit the current recovery of emotional distress damages under FELA for the fear of contracting *cancer* in the future.

2. FELA Does Not Permit "Fear Of Cancer" Claims Before A Plaintiff Has Developed Cancer

Asbestosis is a distinct disease from cancer, and the generally-accepted medical view is that asbestosis is not causally related to cancer and does not itself develop into cancer. See, *e.g.*, A. Churg & F. Green, *Pathology of Occupational Lung Disease* 312 (2d ed. 1998) (describing asbestos-related diseases as a "disparate set of diseases with different epidemiological, pathogenic, pathologic, and prognostic features"); R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); see also *Kilpatrick* v. *Department of Labor*, 883 P.2d 1370, 1375 (1994), amended 915 P.2d 519 (Wash. 1995) ("Each asbestos-related disease involves a unique pathology * * * and is not, in fact, an aggravation or continuation of a different asbestos-related condition."); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So.2d 517, 522 n.7 (Fla. Dist. Ct. App. 1985) ("asbestosis and cancer can be * * * considered distinct sibling diseases parented by the same cause"); *Marinari* v. *Asbestos Corp., Ltd.*, 612 A.2d 1021, 1025 (Pa. Super. Ct. 1992) ("Each of the diseases, i.e., pulmonary asbestosis, asbestos-related pleural disease, lung cancer, and

mesothelioma, is recognized as a separate, and distinct disease.") (citing authorities). Indeed, the majority of jurisdictions have adopted a "separate disease" rule in asbestos cases, which treats asbestosis and other non-malignant, asbestos-related diseases as separate and unrelated to later-developed malignant diseases such as lung cancer and mesothelioma for statute of limitations purposes. See, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (Pennsylvania follows "the majority of jurisdictions which ha[ve] adopted this 'two disease rule' or 'separate disease rule' in asbestos exposure cases") (citing *Marinari*, 612 A.2d at 1023) (collecting cases)); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 (D.C. Cir. 1982) (opinion by Ginsburg, J.) (rejecting notion that a plaintiff could sue "not only for asbestosis, but for consequences that might develop later, including separate and distinct illnesses such as mesothelioma or another form of cancer").[2] Under this separate disease rule, "recovery can be had in a first action only for a disease which has already manifested itself from the exposure to asbestos *and the natural, predictable progression, if any, of that disease.* If addi-

[2] See also, *e.g.*, *Nelson* v. *Industrial Comm'n*, 656 P.2d 1230 (Ariz. 1982); *Hamilton* v. *Asbestos Corp.*, 998 P.2d 403 (Cal. 2000); *Miller* v. *Armstrong World Indus., Inc.*, 817 P.2d 111 (Colo. 1991); *Wilber* v. *Owens-Corning Fiberglas Corp.*, 476 N.W.2d 74 (Iowa 1991); *Carroll* v. *Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699 (Ky. 2000); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020 (Md. 1983); *Larson* v. *Johns-Manville Sales Corp.*, 399 N.W.2d 1 (Mich. 1986); *Stillson* v. *Peterson & Hede Co.*, 454 N.W.2d 430 (Minn. 1990); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. Law Div. 1985); *Fusaro* v. *Porter-Hayden Co.*, 548 N.Y.S.2d 856 (Sup. Ct. 1989); *Potts* v. *Celotex Corp.*, 796 S.W.2d 678 (Tenn. 1990); *Pustejovsky* v. *Rapid-American Corp.*, 35 S.W.3d 643 (Tex. 2000); *Kilpatrick*, 883 P.2d 1370 (Wash. 1994); *Sopha* v. *Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wis. 1999).

tional injuries from a separate disease manifest themselves in the future, such injuries will support a second action." *Marinari*, 612 A.2d at 1023 (emphasis added); see 2 *Stein on Personal Injury Damages* § 9:16 (3d ed. 1997) ("With respect to non-malignant asbestos diseases and cancer caused by exposure to asbestos, a number of courts have adopted the 'two disease' rule," wherein "recovery is first available only for a disease that has already manifested itself from exposure to asbestos, plus the natural, predictable progression of that disease, and then if cancer develops in the future, a second action may be brought.").

Because there is no established causal relationship between asbestosis and cancer—*i.e.*, because they are distinct diseases—the fact that respondents may have developed asbestosis from their exposure to asbestos dust does not entitle them to emotional damages for their fear of developing the separate and distinct disease of cancer. As this Court explained in *Buckley*, courts have permitted recovery for emotional injuries to a plaintiff who suffers from a *disease*, but such recovery must be limited to emotional injuries that are *related* to that disease. 521 U.S. at 432 (common-law courts "do permit a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress") (emphasis added). The only relationship between the asbestosis respondents claim they have now and the cancer they fear they may develop in the future is that both may stem from the same *exposure* to asbestos dust. But, that is not a clear enough relationship for a plaintiff to recover as part of his damages for the first disease his anxiety about the possibility of developing the second distinct disease in the future. *Buckley* makes clear that mere exposure is not a sufficient basis

to permit the recovery for emotional injuries related to diseases not yet suffered. *Id.* at 430, 432.

To be sure, the Court in *Buckley* confronted a case in which the plaintiffs had suffered only exposure to asbestos, and no disease resulting from that exposure had developed. In ruling that exposure alone did not entitle a plaintiff to recovery, the Court distinguished cases in which the plaintiffs had suffered some injury and even noted one state lower-court case that allowed recovery of emotional injuries related to asbestosis. See 521 U.S. at 437 (citing *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ct. C.P., Cuyahoga Cty., Ohio 1987)).[3] But the language and logic of *Buckley* clearly preclude a rule allowing recovery for the fear of contracting a distinct disease in the future based only on the *actual* contraction of a different disease at present. In stating the common-law rule, the Court noted that courts permit "a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress." 521 U.S. at 532 (emphasis added). The relatedness requirement is critical because otherwise *any* physical injury, no matter how slight, would

[3] Respondents' reliance on the *Buckley* Court's citation to *Lavelle* (Br. in Opp. 21) is misplaced. The *Buckley* Court referred to *Lavelle* only to demonstrate that courts generally had not extended emotional distress damages to plaintiffs, like those in *Buckley*, who had suffered *no* disease or other injury at all. That reference should not be read as an endorsement of *Lavelle*'s reasoning, which in fact is flatly contrary to the Court's holdings in *Buckley* and *Gottshall*. See 507 N.E.2d at 479-481 (permitting fear of cancer evidence on alternative grounds that (1) "[m]odern tort law" permits recovery for emotional damages without any proof of physical injury (a proposition rejected in *Gottshall*), and (2) that any requirement of a "physical impact" was satisfied by the exposure to asbestos fibers (a proposition rejected in *Buckley*)).

serve as a gateway for the recovery of fear stemming from *any* increased risks associated with the exposure. However, the whole thrust of *Buckley* is that exposure is an insufficient basis for allowing recovery for fears stemming from exposure and that compensation should be directed to the few who actually contract the disease, rather than the many who fear they will contract it. Moreover, all the policy concerns that led the Court in *Buckley* to reject fear of cancer claims based on mere exposure also support rejecting fear of cancer claims based on the present suffering of a distinct injury. See Part A.3., *infra*.

The distinction between damages for the fear of contracting cancer in the future and the emotional injuries from a present case of asbestosis draws support from FELA's text. FELA authorizes suit by "any person *suffering injury*." 45 U.S.C. 51 (emphasis added). The text clearly focuses on present injuries, rather than on risks of future injuries. It does not permit suits by "any person at risk of suffering injury" or "any person who fears they will suffer an injury." Indeed, Congress targeted the railroad industry in FELA, in part, based on a recognition of the risks inherent in the industry. Nonetheless, Congress developed a scheme to compensate only those for whom the risks became a reality in the form of *actual* injuries.

FELA's preference for compensating injuries that have been suffered underscores that this case, like *Buckley*, involves *when*, not *whether*, individuals who actually contract cancer should recover for their cancer-related emotional injuries. Plaintiffs who currently suffer asbestosis can recover their damages from that disease, including their emotional injuries. If they later contract asbestos-related cancer, they can then recover

for their damages from that distinct disease, once again including their emotional injuries.[4]

Moreover, the well-established "separate disease rule" strongly supports limiting recovery for fear of developing cancer to cases where cancer actually develops. As the Pennsylvania Supreme Court explained in *Simmons* v. *Pacor, Inc.*, a case this Court relied upon in *Buckley*: "It is in [a later action for cancer] that [plaintiffs] can assert their emotional distress or mental anguish claims [related to cancer]. To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the two disease rule." 674 A.2d at 239; see *Cleveland* v. *Johns-Manville Corp.*, 690 A.2d 1146, 1150 n.10 (Pa. 1997) ("If cancer later develops, a plaintiff can bring a second action to recover for the cancer and all of the past, present and future emotional distress or mental anguish associated with the cancer, including fear of contracting cancer.").[5]

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[4] Whatever difficulties there may be in determining the precise scope of the emotional injuries stemming from the disease of asbestosis, one thing that clearly does not flow from the injury of the disease of asbestosis is the fear of suffering a distinct disease at a future date.

[5] Notably, although the Court in *Buckley* held that a disease (or symptoms of a disease) is a prerequisite for *any* recovery for emotional injuries stemming from an alleged exposure to a disease-causing substance, it did not address application of tort rules governing *how* such injuries might be recovered when a disease in fact manifests. Thus, the Court did not address whether fear of cancer is only recoverable as an element of pain and suffering from the cancer itself, or whether it may also be recoverable through a separate action for negligent infliction of emotional distress based on diseases or symptoms unrelated to cancer. That question has caused considerable confusion in the lower federal and state courts.

3. Recognition Of Fear Of Cancer Damages Where No Cancer Has Developed Is Inconsistent With Important Common-Law Policy Concerns And The Purposes Of FELA

The three principal policy considerations identified by this Court in *Gottshall* and *Buckley*—"special 'difficult[y] for judges and juries' in separating valid, important claims from those that are invalid or 'trivial'; "a threat of 'unlimited and unpredictable liability'"; and "the 'potential for a flood' of comparatively unimportant, or 'trivial,' claims," *Buckley*, 521 U.S. at 433 (quoting *Gottshall*, 512 U.S. at 557)—militate strongly in favor of permitting recovery under FELA for the "fear" of developing cancer *only* in connection with an action based on the *actual* development of cancer.

First, permitting recovery for such emotional injuries in the absence of an actual instance of cancer (or even a

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While some courts have permitted recovery based on the existence of a distinct injury other than cancer, see, *e.g.*, *Cox*, 481 So. 2d at 526 (permitting recovery for fear of cancer for plaintiff diagnosed with asbestosis); *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 413-415 (5th Cir.) (en banc) (same), cert. denied, 478 U.S. 1022 (1986); *Herber* v. *Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986) (same for plaintiff with pleural thickening), others have rejected such claims as speculative and inconsistent with the zone of danger test, see, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (limiting fear of cancer claims, regardless of existence of other distinct asbestos-related diseases, to cases in which cancer actually manifests); *Nutt* v. *A.C. & S., Inc.*, 466 A.2d 18, 24 (Super. Ct. 1983), aff'd, 480 A.2d 647 (Del. 1984) (holding "nature of asbestos related injury * * * is clearly incompatible with the traumatic event requirement for recovery of mental anguish"); *O'Banion* v. *Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (rejecting fear of cancer claim as "speculative" under Oklahoma law). For the reasons set forth herein, fear of cancer claims should only be recoverable under FELA as an element of pain and suffering for the cancer itself.

symptom of cancer) presents the same "special [evidentiary] 'difficult[ies] for judges and juries'" that led the Court in *Buckley* to reject fear of cancer claims in the absence of any asbestos-related disease. 521 U.S. at 433. Such claims "are far less susceptible to objective medical proof" and are based on subjective emotional reactions to questionable statistical information concerning the *increased* likelihood of developing cancer, which itself is further complicated by the fact that "contacts, even extensive contacts, with serious carcinogens are common" in our society. *Id.* at 434-435 (citations omitted). Moreover, it is virtually impossible to "determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk * * * is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain * * *, and particularly since neither those exposed nor judges or juries are experts in statistics." *Id.* at 435. The external circumstance of suffering a distinct disease (which simply corroborates the exposure), in addition to exposure, does not solve these difficulties.

Second, "fear of cancer" liability unfettered from actual instances of cancer would present the problem of "unlimited and unpredictable liability" that concerned the Court in *Buckley*. 521 U.S. at 435-436; see *Gottshall*, 512 U.S. at 557. Judges and juries have substantial experience ascertaining damages for actual injuries already suffered. Although damages for emotional injuries are more difficult to estimate, the extent of such damages is a historical fact that can be assessed and given some measure of predictability. But, as this Court noted in *Buckley*, juries would be almost wholly unguided in assessing the damages

caused by a slight increase in the risk of contracting cancer in the future associated with contracting a distinct disease.

Third, fear of cancer liability could likewise produce a flood of relatively trivial cases. Although not every exposure to asbestos results in asbestosis, it is a much more common disease than asbestos-related cancer. Moreover, the logic of allowing recovery for a fear of a distinct disease any time there is some injury would suggest that any time a plaintiff could show an injury beyond mere exposure, that injury would serve as a gateway for fear of cancer claims. Consequently, such liability could impose unreasonable costs on the public and divert increasingly scarce resources away from more deserving plaintiffs, thereby "diminish[ing] the likelihood of recovery by those who later suffer from the disease." *Buckley*, 521 U.S. at 435-436; see *Simmons* v. *Pacor*, 674 A.2d at 238 ("[D]amages for fear of cancer * * * would lead to inequitable results since those who never contract cancer would obtain damages even though the disease never came into fruition. The actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested."). Nothing in either the text or purposes of FELA warrants adoption of such a novel and potentially harmful liability rule. See *Buckley*, 521 U.S. at 438 ("[I]f the common law concludes that a legal rule permitting recovery * * * would on balance cause more harm than good, and if we find that judgment reasonable, we cannot find that conclusion inconsistent with the FELA's humanitarian purpose.").

4. Fears Based On Controversial Statistical Information About Uncertain Increased Cancer Risks Are Neither "Severe" Nor The Product Of "Immediate Trauma" As The Zone Of Danger Test Requires

Both *Buckley* and *Gottshall* recognized that common-law courts permitted recovery of emotional distress damages only where a plaintiff established a *severe* emotional injury stemming from an *immediate trauma.* Those requirements are not satisfied by an increased fear of developing cancer in the future, even when accompanied by a distinct injury at present.

This Court has recognized the common-law requirement that emotional injury must be "severe" in order to be recoverable. "[S]evere emotional injury * * * has generally been required to establish liability for purely emotional injury." *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 566-567 n.13 (1987); see *id.* at 568-69 & nn.18 & 19; see also D. Dobbs, *The Law of Torts* § 308, at 836-37 (2000) ("most courts hold that the plaintiff can recover only if a normally constituted person would suffer, and the plaintiff in fact suffered *severe* distress") (emphasis added); *Prosser on Torts* § 12, at 57 (5th ed. 1984) (same); cf. Restatement (Second) of Torts § 46(2) & cmt. d (1965) (requiring that emotional injury for intentional infliction claims must be "extreme" and "severe"); *Prosser on Torts, supra*, § 54, at 360 (common law's skepticism of emotional distress claims "has of course been more pronounced where the defendant's conduct is merely negligent"). Thus, in *Gottshall*, the Court held that negligent infliction of emotional distress claims were cognizable under FELA in part because "*severe* emotional injuries can be just as debilitating as physical injuries." 512 U.S. at 550

(emphasis added; citation omitted); see also *id.* at 538 (noting court of appeals had determined that plaintiff's emotional injuries were "genuine and severe"); *id.* at 562-564 (Ginsburg, J., dissenting) (describing plaintiffs' emotional distress as "unquestionably genuine and severe"). Similarly, in *Buckley*, the Court noted that FELA's purposes militate in favor of recovery for "a *serious* and negligently caused emotional harm." 521 U.S. at 438 (emphasis added); see *id.* at 435 (mere contacts with carcinogens should not lead to recovery because "they may occur without causing *serious* emotional distress") (emphasis added).

It is equally clear that the common law only permitted recovery of emotional injuries that were the result of immediate traumatic harm. See Restatement (Second) of Torts § 436 cmt. c. (1965) ("the emotional disturbance must be the *immediate* result of the actor's negligent conduct") (emphasis added); *ibid.* ("Subsequent brooding over the actor's misconduct or the danger in which it had put the [plaintiff] is not enough."); see also *id.* § 436(2). Thus, after surveying the cases relied upon in *Gottshall* for the adoption of the zone of danger test, the Court in *Buckley* explained that "in each case where recovery for emotional distress was permitted, the case involved a threatened physical contact that caused, or might have caused, *immediate traumatic harm.*" 521 U.S. at 430-431 (emphasis added; citing cases).[6] Indeed, the Court in *Gottshall* adopted

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[6] See, *e.g.*, *Garcia* v. *Burlington N. R.R.*, 904 P.2d 1085 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (quoting *Gottshall*); *McMillan* v. *National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (zone of danger rule requires plaintiff to show that his physical safety was "imminently endangered"); *Falzone* v. *Busch*, 214 A.2d 12, 17 (N.J. 1965) (zone of danger test limits recovery to

the zone of danger test in large part because it limited recovery to "injuries—physical and emotional—caused by the negligent conduct of their employers *that threatens them imminently with physical impact.*" 512 U.S. at 556 (emphasis added).

Emotional concern over developing cancer, even where the plaintiff has developed some lesser asbestos-related condition, fails to satisfy either the severity or immediacy requirements. As the Court explained in *Buckley*, the common law did not recognize emotional distress damages stemming from "an exposure * * * to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time." 521 U.S. at 432. Such claims generally do not rise to the level of "severe" emotional harm. Among other things, as the Court noted in *Buckley*, "the relevant statistics [regarding *increased* cancer risks] are controversial and uncertain," "extensive contacts" with "serious carcinogens are common," and "those exposed * * * are [not] experts in statistics." *Id.* at 435.

Moreover, because the asserted emotional injury is dependent upon after-acquired (and "controversial and uncertain") statistical information concerning the nature and degree of the purported increased risk of mortality, rather than a natural reaction to an *immediate* traumatic event, fear of cancer claims have no antecedent at common law. Thus, courts—even those applying the more liberal "relative bystander" test rejected for FELA purposes by this Court in *Gottshall*—have universally distinguished between plaintiffs

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situations in which "negligence causes fright from a reasonable fear of immediate personal injury").

experiencing serious emotional injury from immediate traumatic harm and those that experience similar emotional injury based only on later-acquired knowledge. See, *e.g.*, *Dillon* v. *Legg*, 441 P.2d 912, 920 (Cal. 1968) (requiring "direct emotional impact upon the plaintiff from the sensory and contemporaneous observance" of death or serious injury of close relative, in contrast to learning "from others after its occurrence"); *Asaro* v. *Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990) (requiring that plaintiff be "at the scene of an injury producing sudden[] event"); cf. *Jansen* v. *Children's Hosp. Med. Ctr.*, 31 Cal. App. 3d 22, 24 (Ct. App. 1973) (rejecting emotional distress claim based on witnessing daughter's slow, painful death because there was no trauma from a "sudden and brief event").

The Court in *Buckley* clearly recognized that fear of cancer from exposure does not satisfy the common law's severity and immediacy requirements. The development of a distinct disease from the exposure does not alter that conclusion. The diagnosis of asbestosis may confirm the exposure, but it does not create an imminent risk of cancer. Asbestosis does not itself cause cancer; rather, the exposure remains the potential cause of any future cancer. Accordingly, the development of asbestosis does not make the fear of cancer any more immediate, nor does it convert a probabilistic risk of future cancer into a current, severe physical trauma.

B. FELA Requires Corroborating Physical Manifestations Of Negligently Inflicted Emotional Distress

At a minimum, the Court should hold that, consistent with settled common-law principles, FELA requires a plaintiff to show corroborating physical manifestations of a negligently inflicted emotional injury. This Court

has already recognized that many courts apply a physical manifestation requirement for emotional injuries. In *Gottshall*, for example, the Court observed that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see also *id.* at 564 (Ginsburg, J., dissenting); cf. *Buell*, 480 U.S. at 567-570 n.22 (recognizing substantial difference between FELA claims for "pure emotional injury" and those involving "physical symptoms in addition to * * * severe psychological illness").

In fact, at the time of FELA's enactment in 1908, the requirement of corroborating physical manifestations for emotional injuries was firmly established.[7] And the majority of zone-of-danger and relative-bystander States, as well as the Second Restatement, still adhere to that requirement. See Restatement (Second) of Torts, *supra*, § 436A (requiring "bodily harm or other compensable damage" to corroborate emotional injury); *id.*, cmt. c (emotional injury must result in "substantial bodily harm," such as "long continued nausea" or "repeated hysterical attacks"); *Prosser on Torts*, *supra*, § 54, at 364 & n.55 (citing cases and noting "the great majority of courts" require "that the mental distress be

[7] See *Gulf, Colorado & Santa Fe Ry.* v. *Hayter*, 54 S.W. 944, 945 (Tex. 1900); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908, 911 (S.C. 1898); *Kimberly* v. *Howland*, 55 S.E. 778, 780-781 (N.C. 1906); *Pankopf* v. *Hinkley*, 123 N.W. 625, 627 (Wis. 1909); *Purcell* v. *St. Paul City Ry.*, 50 N.W. 1034, 1035 (Minn. 1892); *Simone* v. *Rhode Island Co.*, 66 A. 202, 203-04 (R.I. 1907); *Stewart* v. *Arkansas S. R.R.*, 36 So. 676, 677 (La. 1904); *Watson* v. *Dilts*, 89 N.W. 1068, 1069 (Iowa 1902).

certified by some physical injury, illness or other objective physical manifestation"); *Jones* v. *CSX Transp. Corp.*, 287 F.3d 1341, 1347-1349 (11th Cir. 2002) (citing cases).[8] In addition, as the Eleventh Circuit recently noted, the physical manifestation requirement is also supported by "the weight of authority" among federal courts in FELA, Jones Act (which incorporates and makes applicable to seamen the substantive recovery provisions of FELA), and general maritime cases. *Jones*, 287 F.3d at 1349-1350 (citing cases); accord *Martinez* v. *Bally's Louisiana, Inc.*, 244 F.3d 474, 477-478 (5th Cir. 2001) (Jones Act).

Thus, although the physical manifestation requirement, like the zone of danger standard adopted in *Buckley*, has not been followed in all jurisdictions, it is well-grounded in the common law and is consistent with

[8] See *Hancock* v. *Northcutt*, 808 P.2d 251, 257-258 (Alaska 1991); *Villareal* v. *State*, 774 P.2d 213, 220 (Ariz. 1989); *Towns* v. *Anderson*, 579 P.2d 1163, 1164-1165 (Colo. 1978) (en banc); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985); *Czaplicki* v. *Gooding Jt. Sch. Dist.*, 775 P.2d 640 (Idaho 1989); *Barnhill* v. *Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *Anderson* v. *Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *Beynon* v. *Montgomery Cablevision L.P.*, 718 A.2d 1161, 1163 (Md. 1998); *Daley* v. *LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Olivero* v. *Lowe*, 995 P.2d 1023, 1026 (Nev. 2000); *Thorpe* v. *State*, 575 A.2d 351, 353 (N.H. 1990); *Muchow* v. *Lindblad*, 435 N.W.2d 918, 922 (N.D. 1989); *McMeakin* v. *Roofing & Sheet Metal Supply Co.*, 807 P.2d 288, 290 (Ct. App. 1990), cert. denied, No. 72,580 (Okla. Mar. 19, 1991); *Houston* v. *Texaco, Inc.*, 538 A.2d 502, 505 (Pa. Super. Ct. 1988); *Swerdlick* v. *Koch*, 721 A.2d 849, 864 (R.I. 1998); *Kinard* v. *Augusta Sash & Door Co.*, 336 S.E.2d 465 (S.C. 1985); *Maryott* v. *First Nat'l Bank of Eden*, 624 N.W.2d 96 (S.D. 2001); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 975 (Utah 1993); *Myseros* v. *Sissler*, 387 S.E.2d 463 (Va. 1990).

the goals of FELA and the common-law policy concerns that underlay this Court's decisions in *Gottshall* and *Buckley*. See *Jones*, 287 F.3d at 1348-1350. Most notably, the physical manifestation requirement will help minimize the danger posed by the "unlimited and unpredictable liability" associated with emotional distress claims and will assist judges and juries in making the "highly subjective determinations" necessary to "separat[e] valid, important claims from those that are invalid or trivial," and thereby ensure that the limited available resources are directed first to the most deserving claims. *Buckley*, 521 U.S. at 433-434 (citations omitted).

Here, the application of this test would require judgment for petitioner as a matter of law. Respondents offered no evidence of physical impairment to substantiate that they sustained any emotional harm based on fear that they would get cancer in the future. Indeed, in their own testimony, which appears to comprise the only evidence they presented on this point, respondents never even stated that they experienced fear or even anxiety about developing cancer but only a generalized concern. See J.A. 277, 298-299, 255, 116-117, 332; Pet. 8-9. Such a sparse showing does not begin to satisfy the physical manifestation requirement (or the other well-established common-law limitations on such damages discussed above).

CONCLUSION

The judgment of the circuit court of Kanawha County, West Virginia should be reversed and remanded.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

45 U.S.C. 51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. 53. **Contributory negligence; diminution of damages**

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. 56. **Actions; limitation; concurrent jurisdiction of courts**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all fifty States. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorney's fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Metro-North Commuter R.R. Corp. v. Buckley*, 521 U.S. 424 (1997); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

WLF believes that the decision below is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act ("FELA"). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs ultimately will be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties.

WLF submits this brief as *amicus curiae* in support of petitioner Norfolk & Western Railway Company ("N&W").[1] For the reasons set forth below and in N&W's brief, WLF respectfully submits that this Court should hold that a valid claim for negligent infliction of emotional distress under the FELA requires that the plaintiff's distress be severe and that

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[1] Petitioner and all respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

the claimed distress be corroborated by objective, physical manifestations. This brief does not address the second question presented by N&W's petition.

SUMMARY OF ARGUMENT

Hundreds of thousands of people with no real injury have brought asbestos claims against a fast-growing cast of defendants. Many of these plaintiffs, including respondents here, have obtained large recoveries despite the absence of any serious physical impairment or economic injury. Respondents do not have cancer, and their odds of ever developing asbestos-related cancer are very low. Yet respondents have been awarded nearly one million dollars each for their "fear of cancer" -- a "fear" that respondents did not even contend caused them severe emotional distress and that respondents did not substantiate with any objective evidence.

This result was possible only because the court below failed to adhere to traditional common-law standards for recovery of emotional distress damages. More importantly, this result is symptomatic of the unprecedented economic and judicial crisis caused by asbestos litigation, as some courts' failure to adhere to traditional common-law standards has resulted in an incapacitating flood of claims brought on behalf of people who suffer no serious physical impairment. The consequent explosion of asbestos litigation already has exacted a terrible price: at least 55 U.S. companies have gone bankrupt, and untold numbers of employees and shareholders have suffered. The judicial system also has bent under the weight of this litigation, as some courts have allowed themselves to be transformed into claims-processing facilities, sacrificing fairness for the sake of perceived expediency. Indeed, more and more federal courts should intervene on due process and equal protection grounds as certain state courts fail to apply procedural rules in accordance with constitutional requirements.

If people who are not sick continue to collect damages that have little or no relationship to any real injury, our tort system will have failed to uphold its obligation to "distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Metro-North Commuter R.R. Corp. v. Buckley*, 521 U.S. 424, 443-44 (1997). Such judicial failures may be concentrated in certain localities, but the consequences fall on everyone with a stake in our national economy. This Court should adhere to traditional common-law standards for recovery of damages for emotional distress and should vacate the judgment below.

ARGUMENT

I. AN ASBESTOS PLAINTIFF SHOULD NOT RECEIVE DAMAGES FOR EMOTIONAL DISTRESS ABSENT PROOF OF PHYSICAL MANIFESTATIONS OF SEVERE DISTRESS

a. Respondents received verdicts of nearly a million dollars each, despite the fact that no respondent even claimed to suffer from any physical impairment beyond shortness of breath. *See* Cert. Opp. 6-9 (describing respondents' physical conditions). Respondents' FELA claims fall squarely within the growing ranks of the "up to one-half of asbestos claims [that] are now being filed by people who have little or no physical impairment." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part) (citation omitted). Even in an era of verdict inflation when a "mere" million-dollar award may no longer be newsworthy,[2] it is evident

[2] In Mississippi alone, a State with 1% of the Nation's population, juries have returned at least 20 verdicts of $9,000,000 or more since 1995, including seven that exceeded $100,000,000 each. *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002); Robert

that respondents' recoveries bear no relation to their physical impairments. Respondents' shortness of breath has not caused them to lose significant income or to incur significant medical expenses, and such "pain and suffering" as might be caused by shortness of breath cannot plausibly account for the million-dollar verdicts here. *Cf. Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (distinguishing "pain and suffering . . . 'stemming directly from a physical injury or condition'" from emotional distress "that is not directly brought about by a physical injury"). In short, the only way to explain these verdicts is to presume that the jury followed the trial court's instruction, and respondents' counsel's entreaties, *see* Pet. 9, to compensate respondents for their fear that they would develop cancer in the future.

More fundamentally, the only way to explain cases such as these is the perceived ease of recovering large amounts for claimed emotional injury. If respondents could have hoped only to recover damages commensurate with their minor physical ailments, these cases likely would not have been worth litigating. But if every person with a minor asbestos-related physical ailment stands to receive a large award for emotional distress -- without evidence of a physical manifestation of the claimed distress or any other objective evidence to corroborate it, and without even subjective evidence that the claimed distress is severe -- then every person ever exposed to asbestos and suffering from even mild shortness of breath should file suit.

Far from being hyperbole, this essentially describes the course of asbestos litigation over the past two decades. Hundreds of thousands of people allegedly exposed to asbestos have filed suit, despite the fact that most suffer from little or no physical impairment. The result, as this Court has noted with palpable concern, has been an unprecedented

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Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. Times (Aug. 20, 2001) A1; Jerry Mitchell, *Out-of-state cases, in-state headaches*, Jackson Clarion-Ledger (June 17, 2001) A1.

crisis in judicial administration. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (stating that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation"); *id.* at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring) (similar); *id.* at 866-67 (Breyer, J., joined by Stevens, J., dissenting) (similar); *see also Amchem Prods., Inc.*, 521 U.S. at 631 (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part) (stating that "[a]bout half of the suits have involved claims for pleural thickening and plaques," while only 15 percent have involved claims for cancer).

Under the pressure of this onslaught of litigation, at least 55 American companies have declared bankruptcy and untold numbers of shareholders, employees, creditors, and other stakeholders have suffered tangibly. Auto parts maker Federal-Mogul Corporation, forced into bankruptcy in October 2001, provides a stark example of the economic fallout from asbestos litigation. In 1998, when Federal-Mogul acquired a company with asbestos liability, its 22,000 U.S. employees held in their 401(k) accounts company stock worth $85 million. By 2001, its employees' 401(k) holdings of company stock were worth only $15 million. *See* Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, Bloomberg News (Feb. 4, 2002); *see also* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002) (stating that Federal-Mogul employees owned 16% of the company's stock, which lost 99% of its value from January 1999).

As traditional asbestos defendants have gone bankrupt, plaintiffs' lawyers have widened the net. In 2001, a RAND study found that over 1000 corporations had been sued, and predicted that the list of defendants "will ultimately number several times that." Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (Inst. for Civ. Justice, RAND Corp., Aug. 2001) 11. The study also

noted that participants on both sides of the litigation "said that they expect all of the traditional asbestos defendants to be in bankruptcy within the next two years." *Id.* at 25.

b. To be sure, the relaxation or disregard of traditional common-law standards for emotional injury is part and parcel of the broader phenomenon of the relaxation or disregard of traditional requirements of injury and causation more generally. The basic problem is that people who are not sick are being paid large sums of money, at the expense not only of an ever-expanding roster of defendants, but also at the expense of people who are sick or who will become sick in the future. *See Amchem Prods., Inc.*, 521 U.S. at 598 ("'exhaustion of assets threatens and distorts the process; and future claimants may lose altogether'") (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991)).

Nonetheless, these cases highlight the particular importance of preserving sensible limitations on claims for emotional injury: as explained above, the motivation for basically healthy people to bring suit is the promise of easy and generous recovery for claimed emotional distress. And because the supply of basically healthy people who may have experienced some emotional distress is practically inexhaustible, this phenomenon has enabled the asbestos litigation to reach its current state. *Cf. Buckley*, 521 U.S. at 434 (stating that "contacts, even extensive contacts, with serious carcinogens are common" and citing an estimate that "21 million Americans have been exposed to work-related asbestos"); *Gottshall*, 512 U.S. at 552 (describing the danger of even "*genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct") (emphasis in original). By adhering to traditional standards for emotional injury, this Court thus can take a very important step towards ameliorating the excesses of asbestos litigation.

This Court repeatedly has warned that claims for emotional injury pose unique dangers, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 512 U.S. at 557; *accord Buckley*, 521 U.S. at 443-46; *see also Gottshall*, 512 U.S. at 545-46 & n.4, 551-53. Because of these dangers, the law traditionally has "placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id.* at 546.

In the context of asbestos litigation, these dangers threaten not only defendants such as N&W, but also the judicial system more generally and -- perhaps most poignantly of all -- current and future plaintiffs who really do suffer from serious injuries. Five years ago, in *Buckley*, this Court posed this very question: "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" 521 U.S. at 435-36.

Events have answered the Court's question. After at least 55 asbestos-related bankruptcies (including at least 16 just since January 2000[3]), it should be apparent that the U.S. economy, while enviably resilient, does not have endless capacity to endure the mass reallocation of resources from productive uses to pay people who are not sick. There are only so many million-dollar recoveries to go around. If plaintiffs who have no serious physical injury are permitted to recover large judgments for fear of cancer, current and especially future plaintiffs who actually get cancer may be unable to recover. *Cf. Buckley*, 521 U.S. at 443-44 (stating that courts must consider the "interests of other potential

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[3] *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002).

plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other").[4]

Nor can the judicial system withstand a continued onslaught of asbestos claims. Some courts already have allowed concern with managing their dockets to take precedence over litigants' rights to fair procedures. It is perhaps understandable that the magnitude of the crisis has transformed some courts into claims-processing facilities more focused on disposing of cases than on dispensing justice,[5] but it should go without saying that perceived needs of the moment cannot justify derogations from fair procedures. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) ("the Constitution is meant to protect against,

[4] The Supreme Court of Pennsylvania has set a good example of judicial leadership in defending the ability of the tort system to focus on first things first. That court held in *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (Pa. 1996), that a person with "asymptomatic pleural thickening" has no claim for damages, either for the "mere physical change" that is detectable by x-ray but is "unaccompanied by any detrimental effect," *id.* at 237, or for fear of cancer, *id.* at 238-39. At the same time, however, the court made clear that such a person may recover emotional distress damages if and when she develops cancer, even if she may have developed asbestosis at an earlier time. *See id.* at 239. This sensible "two-disease" rule, *see id.* at 237, 239, benefits plaintiffs as well as defendants and the judicial system, by reducing litigation in the absence of serious injury in order to preserve recovery in the event that serious injury later occurs.

[5] *See, e.g.*, Statement of Hon. Conrad L. Mallett, Jr., *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (July 1, 1999) 155: "Think about a county circuit judge who has dropped on her 5,000 cases all at the same time. . . . The judge's first thought then is 'How do I handle these cases quickly and efficiently?' The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation . . . ."

rather than conform to, current 'widespread belief'"); *United States v. Leon*, 468 U.S. 897, 980 (1984) (opinion of Stevens, J.) ("it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency").

The law always has viewed claims for emotional distress with skepticism, and the scale and economic realities of asbestos litigation make such healthy skepticism even more important now.

c. It also is important to emphasize that because of the interconnected nature of our economy, the burdens of asbestos litigation are borne by the entire Nation, even if certain excesses are localized in certain judicial systems. When a West Virginia court upholds large judgments even in the absence of any serious injury, the court does not merely impose adverse consequences upon West Virginians (apart from those few West Virginians who receive attorney's fees or damages out of those judgments) while the rest of the Nation escapes those adverse consequences. To the contrary, a defendant like N&W has employees in many States and, in all likelihood, shareholders in all 50 States, all of whom will suffer from the failure of the court below to enforce traditional limitations on recovery for emotional distress. *Cf. Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion . . . .").

What is more, the present case is but one among many, and -- with verdicts of "only" *one* million dollars -- far from the most egregious example. *See, e.g., Curry, et al. v. ACandS Inc., et al.*, Civ. No. 2000-181 (Miss. Cir. Ct., Holmes Cty.) ($150,000,000 given to six plaintiffs who collectively claimed zero lost days of work and zero medical expenses, and who alleged only non-impairing pleural conditions or slight asbestosis). Similar scenarios have been and are being repeated in numerous other cases, as certain

courts favor local plaintiffs at the expense of the national economy. *Cf. Blankenship v. General Motors Corp.*, 185 W. Va. 350, 406 S.E.2d 781, 786 (1991) (in a crashworthiness case, declaring that the court systematically will "adopt the rule that is most liberal to the plaintiff" because "simple self-defense" requires ensuring that West Virginia plaintiffs do not lose out to residents of States with more plaintiff-friendly tort rules).[6]

For these reasons, the excesses of asbestos litigation pose a truly national problem necessitating this Court's intervention to protect the national economy. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (stating that defendant's "status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce"); *id.* at 571-73; *Healy v. Beer Institute*, 491 U.S. 324, 335-40 (1989). By adhering to traditional common-law requirements for recovery of damages for emotional distress, this Court will help ensure that compensation remains available for the minority of asbestos plaintiffs who are sick. At the same time, this Court will help protect the interests of the judicial system and of the employees, shareholders, and creditors of the ever-growing ranks of asbestos defendants -- in short, the interests of everyone with a stake in the national economy. *Cf. Ortiz*, 527 U.S. at 883 (Breyer, J., joined by Stevens, J., dissenting) ("[O]f course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is

[6] It bears emphasis that the fact that the FELA generally was intended to benefit workers does not mean that the FELA should be interpreted to embrace every worker's claim. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.").

located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses.").

It is true that the present case arises under the FELA and this Court's decision may not bind courts applying state law. Nonetheless, as a practical matter, many courts will look for guidance to this Court's views on the proper standards for recovery for emotional distress. *See, e.g., Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999) (following *Buckley* on question of Texas law). Indeed, the Supreme Court of Appeals of West Virginia has all but pleaded with this Court to "establish national uniformity on personal injury matters" by articulating "clear, bright line rules of national application." *Blankenship*, 406 S.E.2d at 786 (quotation omitted). Proclaiming that "no court would welcome such rules more hospitably than we," *id.*, the court suggested that this Court's guidance would help to counter the "inevitabl[e] . . . temptation to redistribute wealth in the direction of residents," *id.* at 787 n.11.[7]

This Court should make the most of the opportunity afforded by this case to restore order and fairness in asbestos litigation.

[7] The *Blankenship* court openly confessed that it was attempting to advance the interests of West Virginia residents. The court disavowed any "claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice." *Id.* at 786. "Rather," the court explained, "for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense." *Id.* The court's candor in favoring its own citizens may be novel, but that practice is all too familiar. *Cf.* 3 Debates on the Federal Constitution 583 (J. Elliot ed. 1876) (Madison: "We well know, sir, that foreigners cannot get justice done them in these courts . . . .").

CONCLUSION

For the foregoing reasons, and those expressed by petitioner, this Court should vacate the judgment below.

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No. 01-963

In the Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanahwa County, West Virginia

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The issues at stake in this case are of direct concern to the Chamber and its members. The Chamber's members are defendants in thousands of asbestos cases in federal and state court across the country. In these cases, many claimants who do not have cancer are seeking compensation for their alleged fear that they will develop an asbestos-related malignancy in the future. The routine recognition of such claims would inflate jury awards to asbestos claimants who have suffered little or no physical impairment and increase their settlement demands. Such a trend would make it even more difficult for companies such as the Chamber's members to

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

respond to the "elephantine mass" of asbestos cases of which this Court spoke in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Payments to such individuals, moreover, would deplete the resources available to compensate individuals who actually have asbestos-related illnesses.

In determining whether respondents are entitled to seek damages for emotional distress under the Federal Employers' Liability Act (FELA), 42 U.S.C. § 51 *et seq.*, this Court will no doubt address the common-law principles that govern asbestos claims brought under state law. Courts throughout the country will be influenced by this Court's analysis.[2] The Chamber accordingly has a keen interest in the Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a general rule, the tort system does not afford recovery to individuals who have been negligently exposed to a *risk* of harm, but have not actually been injured. This is a crucial limitation in the litigation of mass torts. While tens of millions of people are exposed to potentially harmful products or substances at one point or another during their lives, only the relatively small number who are hurt by that exposure are entitled to sue for damages.

Claims for damages for fear of cancer and other future illnesses represent an effort to circumvent this fundamental

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[2] This Court's prior decisions addressing the scope of recovery under FELA for negligently inflicted emotional distress have influenced courts considering those issues under state law. See, *e.g.*, *Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) (citing *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424 (1997)); *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W. 2d 88, 92 (Tex. 1999) (same); *Dickerson* v. *International United Auto Workers Union*, 648 N.E.2d 40, 50 (Ohio Ct. App. 1994) (citing *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)).

limitation on tort recovery. Such claims have been called (perhaps too optimistically) "the last possible ripple in the toxic tort/mass tort explosion that began in the early 1980s." M. Hultquist, *Fear of Cancer As a Compensable Cause of Action*, 30 BRIEF 8, 9 (Spring 2001). Although these claims purport to seek recovery for a present emotional harm rather than a possible future injury, they have the same effect as claims directly seeking compensation for the *risk* of harm: They allow recovery by individuals who have been subjected to a risk of physical harm, but have not suffered physical injury. The recognition of such claims has the potential to open wide the floodgates of toxic tort litigation.

Recognition of fear of cancer claims could have a resounding impact on asbestos litigation. It has been estimated that 21 million Americans were exposed to work-related asbestos in the 1930s and 1940s. *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424, 434 (1997). Many people (although a small percentage of the millions exposed to asbestos) have developed asbestos-related cancer and other lung diseases. As this Court is aware, the effort to compensate such individuals for their injuries has burdened the courts and depleted the assets of many companies. Permitting recovery by individuals who do not have cancer, but fear that they may develop cancer in the future, would represent a dramatic expansion of liability that the system can ill afford.

The plaintiffs below, who demonstrated no more than minor breathing impairments relating to asbestos, were permitted to seek emotional-distress damages based on their alleged fear that they would later develop cancer. There was no evidence that plaintiffs' claimed emotional disturbance was severe, physically manifested, or objectively verifiable. Accordingly, if these plaintiffs can obtain damages for fear of cancer, then any claimant who can show the most marginal asbestos-related injury also can recover such damages.

As this Court has recognized, however, "[t]he common law consistently has sought to place limits" on potential liability for negligently inflicted emotional distress "by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 552 (1994). Common law principles, which inform this Court's interpretation of FELA, preclude recognition of claims for emotional distress arising from the fear that past exposure to a harmful substance may cause future disease.

ARGUMENT

A. Asbestos Litigation Is Not Winding Down, But Instead Is Expanding To Include Healthier Claimants Suing Less Culpable Defendants

According to a recent study by the RAND Institute for Civil Justice, more than 500,000 individuals have raised claims relating to asbestos exposure – and most have sued multiple defendants. D. Hensler, S. Carroll, M. White, & J. Gross, *Asbestos Litig. in the U.S.: A New Look At An Old Issue* 1, 3 (Rand 2001) (hereafter "*New Look*"). The cost of resolving these claims has been enormous. So far, U.S. insurers have expended an estimated $21 billion on asbestos claims. *Id.* at 8. At least 41 companies have been bankrupted by asbestos litigation since 1982 – eight of them since January 2000. *Id.* at 10. At this point, accordingly, there can be little doubt that "[t]he tort system * * * has succeeded in delivering society's punitive response to the events of the 1930s and 1940s." C. Edley, Jr. & P. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARVARD J. LEGIS. 383, 390 (1993).

Nevertheless, asbestos litigation "shows no sign of flagging." P. Hanlon, *Asbestos Legislation: A Pragmatic Approach*, SG057 ALI-ABA 321, 323 (2001). A recent study by the Rand Institute found that the number of asbestos

claims filed annually has "risen sharply" in recent years. D. Hensler, *New Look*, at 2. This increase is reflected in the growing backlog of cases pending in federal and state courts, which doubled from an estimated 100,000 in 1990 to more than 200,000 in 1999. H. Rep. 106-782, at 18 (2000).

Two trends appear to account for this increase in asbestos cases. First, the number of different companies facing substantial exposure to asbestos claims has multiplied. In the early 1980s, "traditional" defendants such as the manufacturers, distributors, and installers of asbestos insulation accounted for about three-quarters of expenditures on asbestos claims. D. Hensler, *New Look*, at 11. As litigation has depleted the resources of traditional defendants, however, plaintiffs have cast their nets more broadly. "As one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on those defendants." *Id.* at 25. Thus, "[b]y the late 1990s, nontraditional defendants accounted for about 60 percent of asbestos expenditures." *Id.* at 11. Many of these defendants were less directly involved with asbestos – and are less responsible for its harmful effects – than the companies that profited directly from the manufacture and distribution of asbestos products. See S. Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1.

Second, the average asbestos claimant today is healthier. "[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment." Edley & Weiler, *supra*, at 393; see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (observing that about half of asbestos claims involve "pleural thickening and plaques – the harm-

fulness of which is apparently controversial").[3] Because the marginal costs of pursuing additional claims alleging this mature tort is low, plaintiffs' lawyers have the incentive "to push forward not merely the claims of those who are physically impaired but also those of persons merely have been exposed to asbestos and may never become impaired." Hearings Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts on The Fairness In Asbestos Compensation Act of 1999, Prepared Statement of Richard A. Nagareda, at 3 (Oct. 5, 1999) (as reported in Federal News Service).

As one pair of commentators has recognized, claims by individuals who have no substantial impairment often "produce substantial payments (and substantial costs)." Edley & Weiler, *supra*, at 393. In a widespread practice, "law firms refuse to settle the sick cases without substantial compensation for their unimpaired cases." Hearings Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts on The Fairness In Asbestos Compensation Act of 1999, Prepared Statement of Hon. Conrad Mallett, at 55-56 (July 1, 1999) (as reported in Federal News Service) ("Mallett Statement"). Moreover, particularly in a few notorious jurisdictions, juries have repeatedly awarded millions of dollars to relatively unimpaired claimants. See, *e.g.*, 2 No. 4 Andrews Tire Defect Litig. Reporter 6, *Miss. Jury Awards $150M To Workers Exposed To Asbestos* (2001). Although some judges are scrupulous in reducing excessive awards (see, *e.g.*, *Cain* v. *Armstrong World Indus.*,

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[3] There is one significant exception to this trend. Although today there are fewer claims by plaintiffs with severe asbestosis, there has been an unexpected increase in claims by plaintiffs with mesothelioma and lung cancer. See D. Hensler, *New Look* at 6-7. The fact that individuals exposed to asbestos decades ago are now developing cancer underscores the importance of preserving funds to compensate people who actually become seriously ill.

785 F. Supp. 1448, 1452-57 (S.D. Ala. 1992)), others refuse to remit even the most outlandish awards and instead pressure the defendants to settle. See, *e.g.*, Hearings Before The House Committee on the Judiciary on The Fairness in Asbestos Compensation Act, Jumbo Consolidations in Asbestos Litigation, Prepared Statement of William N. Eskridge, Jr., at 26 (July 1, 1999) (as reported in Federal News Service) ("Eskridge Statement") (after Mississippi jury returned verdict of $48.5 million for 12 plaintiffs, including several with no demonstrable injury, the court pressured defendants to settle the cases "on draconian terms").

Finally, courts in some jurisdictions (including West Virginia, where respondents' claims were tried) have allowed the mass consolidation of asbestos claims. See, *e.g.*, *State ex rel. Mobil Corp.* v. *Gaughan*, 2002 WL 745965 (W. Va. Apr. 25, 2002) (denying writ of prohibition challenging consolidation of several thousand asbestos personal injury claims). Such "non-traditional judicial management techniques" (*State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996)), which are designed to speed the resolution of cases, have only encouraged more filings of weak cases. See Hon. H. Freedman, *Product Liability Issues in Mass Tort – View From the Bench*, 15 TOURO L. REV. 685, 688 (1999) (acknowledging that aggressive case management has had the tendency to "encourage additional filings and provide an overly hospitable environment for weak cases"). The sheer volume of claims increases the risk to the defendants and, accordingly, the settlement value of relatively weak cases. See Eskridge Statement, at 28. The joinder of claims by impaired and unimpaired individuals also increases jury awards to healthier plaintiffs. See *id.* at 29 ("Plaintiffs' counsel can * * * exploit the sympathy effect by associating most-injured plaintiffs with less or least-injured plaintiffs in a consolidated action.").

Thus, there is ample justification for Justice Breyer's observation that "[t]he sickest of victims often go uncompen-

sated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Amchem*, 521 U.S. at 639 (Breyer, J., concurring in part and dissenting in part). The diversion of resources to pay marginal claims also raises valid concerns that there will remain insufficient funds to compensate plaintiffs who become seriously ill in the future.

B. Alleging Fear of Cancer Has Become A Popular Tactic to Enhance Recovery by Asbestos Plaintiffs

It should come as no surprise that asbestos plaintiffs' lawyers, and others representing plaintiffs in toxic tort cases, have looked for ways to enhance recovery by individuals who have been exposed to asbestos but are relatively healthy. See generally, *e.g.*, J. Henderson Jr. & Aaron Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S. C. L. REV. 815 (forthcoming 2002). Most courts have rebuffed efforts by plaintiffs to recover directly for their elevated cancer risk, recognizing that "'proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.'" *Amendola* v. *Kansas City S. Ry. Co.*, 699 F. Supp. 1401, 1407 (W. D. Mo. 1988) (quoting *Schweitzer* v. *Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985)); but see, *e.g.*, *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 411 (5th Cir. 1986) (applying Mississippi law to allow claimant with asbestosis to recover for the risk that he will develop cancer, but noting that "having recovered cancer damages, he cannot later recover more if and when he develops cancer"). "Fear of cancer" claims brought under the rubric of negligent infliction of emotional distress, however, have been more successful. See, *e.g.*, *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. 1985) (refusing to recognize a cause of action for increased cancer risk, but recognizing claim for fear of cancer). See also A. Klein, *Fear of Disease and the Puzzle of Future Cases in Tort*, 35 U.C. DAVIS L. REV. 965 (2002); J. Yearout, *Fear of Future Harm in Toxic Tort Litigation: The Appropriate Measure of Damages*, 22 AM. J. TRIAL ADVOC. 639 (1999); J. Smith, *Increasing Fear of Future Injury Claims: Where Speculation Carries the Day*, 64 DEF. COUNS. J. 547 (1997).

In fact, plaintiffs' attorneys, who "have honed the litigation of asbestos claims to the point of almost mechanical regularity" (*Ortiz*, 527 U.S. at 822), now bring "fear of cancer" claims routinely. A presenter at the 2001 Annual Convention of the Association of Trial Lawyers of America (ATLA), for example, stated unequivocally that "[a] FELA plaintiff claiming asbestos related disease should be alleged as a separate and distinct injury the increased 'fear of cancer." M. Doran, *Litigating Asbestos Cases Under the FELA*, 2 Ann. 2001 ATLA-CLE 2707 (2001). To the extent that fear of cancer claims are recognized, therefore, they will likely be made by *every* plaintiff who can possibly assert them.

This case is a good example. The plaintiffs here, who range in age from 60 to 77 (JA 99, 255, 263, 278, 302, 334), contended that they suffer in varying degrees from shortness of breath upon exertion. JA 114, 253, 275-276, 294-295, 330, 353-356. Each plaintiff except one was a long-term smoker; three plaintiffs smoked for close to 50 years. JA 100, 247, 265, 302, 336. Although the plaintiffs produced evidence of asbestosis, none showed any sign of developing asbestos-related cancer. Moreover, none substantiated his allegation that he was suffering emotional distress related to fear of cancer. Indeed, the only plaintiff who described his emotional state – he said that he was "a nervous wreck" and "depressed" – volunteered that he was "more afraid of the shortness of breath" than he was concerned about the risk of developing cancer. JA 298-299.

Nonetheless, over the defendants' objections, the plaintiffs were permitted to seek additional compensation for their fear that they might some day develop cancer. Plaintiffs' counsel elicited from the plaintiffs testimony that they were concerned about the possibility that they would develop cancer in the future. JA 116, 260, 277, 298-299, 331. Plaintiffs' expert gave graphic testimony about mesothelioma. JA 154-155 (witness states that mesothelioma is "almost * * * universally fatal" and "very painful" and that it is "well-documented" that family members who come into contact with a worker's asbestos-contaminated clothing can contract mesothelioma). Finally, the jury was instructed that "any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear." JA 573. This emphasis on cancer risk appears to have been successful. Although only one plaintiff testified that his daily activities were affected by his shortness of breath, each plaintiff was awarded (before discounting for contributory negligence) between $770,640 and $1,230,806 in damages. JA 579, 580, 583, 584, 587, 588.[4]

C. Application of Traditional Common Law Principles Precludes Respondents' Claims For Fear Of Cancer

If respondents may recover damages for fear of cancer, then any claimant who experiences even minimal impairment from an asbestos-related disease may do so. In fact, however, the traditional common law principles applied by the Court in *Gottshall* and *Buckley* preclude recovery for the type of emotional distress at issue here – that is, anxiety or fear

[4] The plaintiff who received the lowest award, $770,640, was 77 years old. JA 99. A smoker for close to 50 years (JA 100), he testified that he suffered from moderate shortness of breath. JA 114. He testified that the knowledge that he has asbestosis and might develop cancer makes him "think occasionally." JA 121.

that is rooted in the claimant's understanding that past exposure to a toxic substance may someday, in some cases, result in illness. Under the traditional rules, moreover, recovery for an emotional disturbance is impermissible unless the distress results in an injury or other physical manifestation. Even if fear of cancer claims are sometimes cognizable, respondents' claims should not have been submitted to the jury because respondents exhibited no such symptoms.

1. As the Eleventh Circuit recently observed, "[a]ny attempt at a consistent exegesis of the authorities" on recovery for negligently inflicted emotional distress "is likely to break down in embarrassed perplexity." *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1347 (11th Cir. 2002) (quoting *Hunsley* v. *Giard*, 553 P.2d 1096, 1098 (Wash. 1976)). Notwithstanding the confusing inconsistencies among the cases, it is possible to identify three significant lines of authority in which courts have allowed recovery for negligently inflicted emotional distress.

First, where plaintiffs have suffered a physical injury from a traumatic event, courts have allowed them to recover for the emotional injuries that flow proximately from the same event. See generally W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 54 (4th ed. 1984). This ground for recovery is generally embodied in Section 456(a) of the RESTATEMENT (SECOND) OF TORTS, the relevant provision of which states that an actor whose negligent conduct causes bodily harm is also subject to liability for "fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it." See *id.* § 456(a). The paradigm example of this principle is described in the RESTATEMENT, which explains that "one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him." *Id.*, Cmt. e; see also, *e.g.*, *Vance* v. *Vance*, 408 A.2d 728, 731 (Md. 1979) (the physical impact rule de-

nies recovery unless "there was impact upon the plaintiff coincident in time and place with the occasion producing the emotional distress").

Second, "[p]erhaps based on the realization that a near miss may be as frightening as a direct hit" (*Gottshall*, 512 U.S. at 547 (citation and internal quotation marks omitted)), many courts have expanded the right to recover for emotional injury to plaintiffs who either experience physical contact *or* are placed in an "immediate risk of physical harm" by the defendant's negligent conduct (*id.* at 548). This approach has come to be known as the "zone of danger" test. *Id.* at 547-548. The zone of danger test originated from a desire to soften the harsh results yielded by strict application of the physical impact rule and to allow recovery by those whose proximity to negligently dangerous conduct resulted in the infliction of an immediate and substantial emotional injury. See *D'Ambra* v. *United States*, 354 F. Supp. 810, 816 (D.R.I. 1973), citing *Mitchell* v. *Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (applying physical impact rule to deny recovery to a woman who, after nearly being run over by a negligently-driven horse carriage, passed out from fright and suffered a miscarriage).

Finally, in what has been called the "relative bystander" test, a number of courts have allowed certain plaintiffs who are outside the zone of danger but are so situated that they are extremely likely to suffer emotional distress from a particular sort of negligent conduct (for example, because of their close relationship to the one injured) to recover damages for their substantial emotional injuries. See, *e.g.*, *Dillon* v. *Legg*, 441 P.2d 912 (Cal. 1968) (allowing recovery by plaintiffs who witness a close relation's death or injury or arrive on the scene soon thereafter).

In *Gottshall*, this Court stated that "Congress intended the scope of the duty to avoid inflicting emotional distress under FELA to be coextensive with that established under the zone

of danger test." *Id.* at 555. Under that test, "[r]ailroad employees" may "recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Id.* at 556.[5] The Court decided *not* to adopt the more expansive "relative bystander" test, as it "discern[ed] from FELA and its emphasis on protecting employees from physical harms no basis to extend recovery to bystanders outside the zone of danger." *Id.* at 557.

2. "For many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish." *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W. 2d 88, 91 (Tex. 1999) (citation and internal quotation marks omitted). This Court's reasoning in *Gottshall* and *Buckley* precludes recognition under FELA of fear of cancer claims in the typical asbestos case. In such cases, the claimant's emotional distress arises long after the exposure, when he or she learns that the exposure may cause disease in the future. Thus, it is an entirely different type of injury from the emotional distress arising from a contemporaneous traumatic event, which has, in some circumstances, been deemed compensable at common law.

As the Court observed in *Buckley*, the "zone of danger" test adopted in *Gottshall* for FELA cases permits damages for emotional distress only when it is attributable to "a threatened physical contact that caused, or might have caused, *immediate traumatic harm*." 521 U.S. at 430 (emphasis added); see also, *e.g.*, *Dziokonski* v. *Babineau*, 380 N.E.2d 1295, 1300 (Mass. 1978) (zone of danger test allows recovery by those who were at risk of "contemporaneous bodily

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[5] The Court expressly rejected the physical impact test, as it saw "no reason * * * to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Id.*

bodily harm"). That test, the Court concluded, comports with FELA's focus on protecting workers from "physical invasions" and "emotional injury caused by the apprehension of physical impact." 521 U.S. at 431 (citations and internal quotation marks omitted). Thus, the Court opined, FELA does not cover emotional injuries from "exposure * * * to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time." *Id.* at 432.

Unlike the *Buckley* plaintiffs, the respondents here were found to suffer from a physical injury related to asbestos. But, under the reasoning of *Gottshall* and *Buckley*, that fact does not make them eligible to recover damages for fear of cancer. As the Court concluded, FELA compensates emotional distress only when it arises from contact that causes or threatens "immediate traumatic harm." 521 U.S. at 430. See also RESTATEMENT (SECOND) OF TORTS § 436, Cmt. c (explaining that recovery for physical harm resulting from emotional disturbance is unavailable unless "the emotional disturbance [is] the immediate result of the actor's negligent conduct"); Henderson & Twerski, *supra*, at 829 (the law allows "recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature"). Exposure that leads only to a risk of long-delayed future disease, and which causes concern only when the claimant learns of the risk, plainly does not satisfy that description. See RESTATEMENT (SECOND) OF TORTS § 436, Cmt. c ("Subsequent brooding over the actor's misconduct or the danger in which it had put the other is not enough to make the negligent actor liable for an illness so brought on."); Henderson & Twerski, *supra*, at 829 ("general malaise that follows upon the heels of negligent conduct" is not compensable). This remains the case even if the exposure eventually results in another illness.[6]

As a practical matter, moreover, the mere fact that a plaintiff can point to a minor breathing impairment related to asbestos "does not seem to offer much help in separating valid from invalid emotional distress claims." *Buckley*, 521 U.S. at 434. True, the presence of lung disease *can* show objectively that asbestos has entered the lungs.[7] But the same can be said of the vast number of claimants who have asymptomatic pleural thickening, but who generally are denied any tort recovery. See, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 240 (Pa. 1996) (acknowledging "that the specter of cancer weighs heavily on the minds of those diagnosed with pleural thickening" but holding "that awarding damages for the increased risk and fear of cancer is contrary to the established jurisprudence of this Commonwealth").

Thus, the "general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well." *Buckley*, 521 U.S. at 436. This Court should rule, as a matter of law, that fear of cancer claims are not compensable under FELA, even if the claimant has developed another asbestos-related injury.

3. Even if the Court is unwilling to preclude all fear of cancer claims by asbestosis sufferers, however, it should reverse the decision below. Because respondents demonstrated no physical manifestation of their alleged emotional distress, they would not have been entitled to any damages under the

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[6] Of course, the plaintiff can recover damages for any emotional injury he suffers as a result of the illness that he does develop.

[7] The fact that many asbestos claimants were also heavy smokers, however, can make it impossible to ascertain the source of impairment with any certainty.

traditional rule. The Court should apply that rule in cases brought under FELA.

"Until 1970, almost every state * * * require[d] a showing that the plaintiff [seeking damages for negligently inflicted emotional distress] ha[d] suffered bodily injuries as a result of the emotional distress." N. Bagdasarian, *A Prescription For Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J. L. & M. 401, 402 (2000). The Court in *Gottshall* acknowledged that many states follow this rule (512 U.S. at 549 n.11), and "both of the plaintiffs in *Gottshall* demonstrated objective manifestations of their distress." *Jones*, 287 F.3d at 1346; see W. Krizner, *Is There a Better Standard Than the Zone of Danger Test for Negligent Emotional Distress Claims Under the Federal Employer's Liability Act?*, 34 TORT & INS. L.J. 907, 917 (1999) (opining that the Court in *Gottshall* "did indeed intend a physical manifestation requirement").

The physical manifestations requirement arose from judicial recognition of the need "to place some boundaries on the indefinable and unmeasurable psychic claims." *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985). It is also rooted in the notion that, to be compensable, an emotional injury must be severe. See RESTATEMENT (SECOND) OF TORTS § 436A, Cmt. b. ("emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and * * * the law does not concern itself with trifles"). As emotional injury is easily feigned, the physical manifestations requirement also has been deemed "necessary to curb the potential of fraudulent claims." *Champion*, 437 So. 2d at 17. Moreover, the physical manifestations requirement "is relatively easy to administer," and "has the virtue of predictable application." *Reilly* v. *United States*, 547 A.2d 894, 895-897 (R.I. 1988).

Some courts have abolished the physical manifestations rule, requiring instead that the plaintiff's injury satisfy some qualitative or quantitative standard. See generally Bagdasarian, *supra*, at 412-416. Hawaii, for example, permits recover "where a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." *Rodrigues* v. *State*, 472 P.2d 509, 520 (Haw. 1970). Maine permits recovery for "serious" mental injury. *Culbert* v. *Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982). California allows recovery where the negligent conduct "foreseeably elicited serious emotional responses in the plaintiff." *Molien* v. *Kaiser Found. Hosp.*, 616 P.2d 813, 821 (Cal. 1980). Such standards, however, are too vague and subjective to be useful in "separating valid from invalid emotional distress claims" (*Buckley*, 521 U.S. at 434) – and their adoption would only encourage the filing of fear of cancer claims under FELA.

In the event the Court concludes that FELA permits "fear of cancer claims" by individuals with asbestosis, therefore, it should require that claimants demonstrate physical manifestations of their emotional injury. As the Eleventh Circuit has concluded, the requirement is "well-grounded in the common law" and accords with "the common law's cautious approach to recovery for mental and emotional injuries." *Jones*, 287 F.3d at 1347, 1349. Adhering to the requirement also will help to minimize "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 1349 (quoting *Gottshall*, 513 U.S. at 557).

That "specter" is very real where asbestos claims are concerned. Indeed, if the right to recover for fear of cancer is recognized, "[c]laims based on marginal fault that result in damages based on fear created by tiny increments of increased risk will come to dominate the asbestos litigation scene." Henderson & Twerski, *supra*, at 839.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted.

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IN THE

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v.

FREEMAN AYERS, ET AL.,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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IN THE

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On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMERICAN INSURANCE ASSOCIATION

Founded in 1866 as the National Board of Fire Underwriters, the American Insurance Association (AIA) is a national trade association representing 410 companies writing property and casualty insurance in every state and jurisdiction of the United States.[1] AIA members write insurance that covers asbestos-related liabilities of their insureds. AIA filed an amicus brief supporting the petitioner in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), in

[1] Counsel for AIA authored this brief in its entirety. No person other than AIA, its members or its counsel made a monetary contribution to the preparation or submission of the brief. The parties' written consent to the filing of this brief has been filed with the Court.

which the Court concluded that mere exposure to a potentially toxic substance could not support an award of damages for emotional distress under the Federal Employers Liability Act. Here, as in *Buckley*, allowing respondents to recover for "fear of cancer" would distort sound principles of tort law and jeopardize the ability of the courts and the insurance industry to provide fair compensation to those who sustain actually injuries fairly attributable to the breach of a legal duty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents sued petitioner in state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, seeking damages for injuries allegedly sustained as a result of occupational exposure to asbestos. The evidence at trial included medical testimony to the effect that each respondent suffered from asbestosis or a similar condition, and that exposure to asbestos had increased each respondent's risk of developing some form of cancer at some point in the future. *See* Br. in Opp. 4-5. The court instructed the jury that there was no evidence that any respondent "has cancer or that he will, with reasonable certainty develop cancer in the future," so the jury could not "award damages . . . for cancer or for any increased risk of cancer." J.A. 573. It further instructed, however, as follows:

> You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering.

Id.[2] The jury found that each respondent had suffered damages ranging from $770,000 to $1.2 million. After offsets for other settlements and, in three instances, reductions for contributory negligence through smoking, the court entered final damage awards ranging from $523,000 to somewhat over $1 million. *See* J.A. 578-589.

The substantial damage awards in this case accordingly appear to have been based in part on "fear of cancer." The instruction that permitted that conclusion exemplifies a widespread confusion in the law concerning when it is appropriate to award damages for such fear in asbestos cases. Petitioner is surely correct that any plaintiff who seeks to recover such damages under FELA should, at a minimum, be required to prove some substantial physical manifestation of the claimed emotional distress. There are, however, two closely related but logically antecedent points that this Court should address before reaching the physical-manifestation issue. *See Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (point may be considered where it is "predicate to an intelligent resolution" of the question presented); *Cuyler v. Sullivan*, 446 U.S. 335, 342-43 n.6 (1980) (same); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (same).[3]

First, FELA does not permit recovery for fear of developing, in the future, a disease that the plaintiff does not now

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[2] The court instructed generally that if petitioner was found liable, each respondent was entitled to recover for, among other things, "injury or impairment and physical and mental pain and suffering in the past; [and] any injury and impairment and physical and mental pain and suffering that may reasonably be expected to occur in the future." J.A. 573.

[3] The Court should in any event make clear, for the benefit of the lower courts and the bar, that any holding on the question whether recovery for emotional distress requires evidence of a "physical manifestation," *see* Pet. i, does not resolve the logically prior issues that we address in this brief. In particular, the Court should clarify that *Buckley* does *not* hold that FELA permits recovery for "fear of cancer" whenever a plaintiff can show evidence of asbestosis. *See* Br. in Opp. 21.

have and may well never contract. The Court reached that conclusion in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), and there is no reason for a different result here. The law restricting the award of such damages cannot be avoided simply by characterizing them as an element of "pain and suffering" associated with a *different* disease or medical condition that the plaintiff *does* have. Apart from that instructional error, this case differs from *Buckley* only in that the plaintiffs produced evidence that they have asbestosis. But while asbestosis confirms that a plaintiff was exposed to asbestos — a point that was not disputed in *Buckley* — it is not cancer, is not a symptom of cancer, and does not evolve into or lead to cancer. Accordingly, evidence of asbestosis does not in any way affect *Buckley*'s reasons for refusing to authorize the award of damages for "fear of cancer" under FELA.

Second, another well established limit on emotional-distress damages is that to be compensable, a plaintiff's alleged fears must be reasonable. That requirement is not self-defining, particularly in the fear-of-cancer context. Many courts seem to have confused the question whether such fear is reasonable with the question whether the underlying toxic exposure has given rise to any present physical injury, such as asbestosis. If, however, there is to be liability for "fear of cancer" at all, the better approach would be to confront the question directly, and to require fear-of-cancer claimants to prove that they are *more likely than not* to develop cancer.

That probability would, moreover, have to arise from the alleged toxic exposure, not from some other cause. As even the court below recognized, respondents could not meet those standards. In particular, all but one of the respondents in this case were current or former smokers. Smoking is the overwhelmingly predominant cause of lung cancer. Given the medical evidence that petitioner has marshaled concerning the risks and causes of cancer, it would be unreasonable to impose a legal duty on petitioner with respect to respondents' alleged fears of developing cancer. Simply stated, if plaintiffs who smoke have a fear of cancer, that fear is reasonably related to their smoking — not to the violation of any legal duty owed by a FELA defendant.

ARGUMENT

I. FELA DOES NOT ALLOW RECOVERY FOR FEAR OF A DISEASE THAT THE PLAINTIFF DOES NOT HAVE AND MAY NEVER DEVELOP

This Court held in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994), that FELA plaintiffs may recover damages for negligent infliction of emotional distress if they can satisfy the "zone of danger" test, by showing that the defendant's negligence led to some "physical impact" on the plaintiff, or put the plaintiff at "immediate risk" of such an impact. In *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), the Court considered the application of those standards to a case much like this one, and concluded that they did *not* permit recovery for emotional distress merely on the basis of exposure to "a substance that might cause a disease at a future time." *Id.* at 430. Rather, a worker negligently exposed to asbestos may not recover for emotional distress under FELA "unless, and until, he manifests symptoms of a disease." *Id.* at 427; *see also id.* at 430.

A. A Plaintiff May Not Recover for Fear of Cancer as Part of the Pain and Suffering Associated With Asbestosis

The trial court charged the jury in this case on the theory that respondents were entitled to recover for fear of cancer as part of ordinary pain-and-suffering damages on their claim for the disease of asbestosis — the only physical injury they have alleged. As petitioners have pointed out (Pet. 12), however, a plaintiff normally may recover only for pain and suffering that is directly related to the physical injury that provides the principal basis for a claim. *See, e.g., Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203, 1211 (N.D. Cal. 1994) (damages for fear of cancer are recoverable where they are "derivative" of serious physical injury, but they must be

"parasitic of the physical injury involved" — *i.e.*, there must be "a verifiable causal nexus between cancer and the injury suffered"); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (where negligence causes injury, "anxiety specifically due to a reasonable fear of a future harm *attributable to the injury* may also constitute a proper element of damages" (emphasis added)); *Shumosky v. Lutheran Welfare Servs. of Northeastern Pa., Inc.*, 784 A.2d 196, 201 (Pa. Super Ct. 2001) ("[P]arasitic damages for fear of AIDS are available where there is a verifiable causal connection between the injury and the possible development of AIDS.").[4]

Thus, a plaintiff with a present physical injury of asbestosis may recover for the pain and suffering caused by *that* injury up to the time of trial, and for similar pain that it may reasonably be expected to cause in the future. The recovery may include damages for reasonable past fear that the defendant's negligence would lead to asbestosis (a fear confirmed by the development of the injury itself), and for reasonable fear about the future progress or complications of *that* disease. The injury of asbestosis provides, however, no sufficient basis for awarding damages for fear of some *other* disease, such as cancer. *See Barron*, 868 F. Supp. at 1211 ("If no nexus were required between cancer and an alleged injury, an injury akin to a spinal puncture, serious but unrelated to

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[4] Consequential damages for a present physical injury may also include compensation for the risk of reasonably certain future physical injuries, at least where a jurisdiction's rules concerning claim-splitting would preclude a later action based on those injuries. *See, e.g., Dillon v. Evanston Hosp.*, ___ N.E.2d ___, 2002 WL 1038725, at *6-*9 (Ill. May 23, 2002). Most courts hold that such "risk" recovery (which is distinct from the "distress" recovery at issue here) requires a showing that the plaintiff will more likely than not suffer the future injury, although some courts have relaxed that rule. *See id.* at *8-*13. The trial court in this case followed the majority rule, instructing the jury that it could not award damages for any increased *risk* of cancer, because "none of the plaintiffs ha[s] offered evidence that he . . . will, with reasonable certainty develop cancer in the future." J.A. 573.

cancer, would admit recovery of parasitic damages for fear of cancer. Indeed, any serious physical injury, however unrelated to cancer, would permit fear-of-cancer damages.").

B. *Buckley* Precludes an Award for "Fear of Cancer" as Recovery for Emotional Distress Under FELA

Any award of damages for fear of cancer in this case must therefore be defended, if at all, on the ground that it satisfies the requirements established in *Gottshall* and *Buckley* for the recovery of FELA damages for negligent infliction of emotional distress. Respondents appear to acknowledge this point, arguing that their recovery for "emotional distress, including fear of cancer" is "consistent with" *Buckley* because they, unlike the plaintiff in *Buckley*, have "manifest[ed] symptoms of a disease" — *i.e.*, asbestosis (or, in any event, some "occupational pneumoconios[is]"). Br. in Opp. 21 (in part quoting *Buckley*, 521 U.S. at 427); *see id.* at 21-22. That argument, however, seriously misreads *Buckley*'s reasoning.

Buckley squarely held that FELA plaintiffs cannot recover for negligent infliction of emotional distress based solely on exposure to some potentially toxic substance (there, as here, asbestos) that leads them to fear the development of a disease in the future. *See* 521 U.S. at 427, 430. On the other hand, the Court recognized that, as discussed above, the common law permits recovery for emotional distress, including past fear, as an element of pain and suffering, where the plaintiff has in fact contracted *the feared disease*, as demonstrated by recognized symptoms. *See id.* at 429-30 (citing *Simmons v. Pacor, Inc.*, 674 A.2d 232, 239 (Pa. 1996) (noting that plaintiff may recover for prior fear *after* contracting cancer), and *Restatement (Second) of Torts* § 924(a) (1977) (stating that a plaintiff may recover for emotional distress as part of the ordinary damages for actual injury)). The Court's discussion implies, but does not directly resolve, an intermediate question: Should there be FELA recovery for fear of a particular disease when a plaintiff can show some physical

indication (such as pleural thickening or asbestosis) that confirms or follows from toxic exposure, but that is not a symptom of the disease the plaintiff claims to fear (here, cancer)?

Out of context, *Buckley*'s summary of its holding — that a worker exposed to asbestos "cannot recover [for emotional distress] unless, and until, he manifests symptoms of *a* disease," 521 U.S. at 427 (emphasis added) — could perhaps be read to suggest that an exposed worker who shows symptoms of *any* disease, including asbestosis, may then recover for *any sort* of emotional distress, including fear of cancer. Read as a whole, however, *Buckley* controls, and disposes of, respondents' fear-of-cancer claim.

1. Respondents Were Never Placed in Imminent Danger of Immediate Physical Harm

Both *Buckley* and *Gottshall* recognized that a claim for negligent infliction of emotional distress requires proof that the defendant exposed the plaintiff to a risk of immediate physical injury. In *Gottshall*, the Court held that plaintiffs can recover for emotional distress under FELA if they either sustain a "physical impact" as a result of the defendant's negligent conduct or are "placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. This "zone of danger" standard permits plaintiffs "to recover for injuries — physical and emotional — caused by the negligent conduct of their employers *that threatens them imminently with physical impact*." *Id.* at 556 (emphasis added).

In tracing the history of the emotional-distress tort, *Gottshall* explained that the earliest cases allowed recovery only where a plaintiff suffered a physical injury from a sudden, traumatic event. *Id.* at 554-55; *see, e.g., Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (no recovery for fright from near collision with horse cart); *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 23 A. 340 (Pa. 1892) (denying recovery for fright without physical injury from train accident on plaintiff's property); *see also Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (under traditional rule, there

was no recovery "unless the plaintiff suffered a contemporaneous traumatic physical injury"). Indeed, in these cases, emotional distress was not an independent basis for liability, but an item of "parasitic" damages for a tort involving physical injury. *See* Speiser, Krause & Gans, *The American Law of Torts* 943-44 (1987); *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967) (awarding damages for mental distress in addition to physical injuries sustained from near fall from defective stairway); *see also* pp. 5-7, *supra*. Many courts eventually relaxed the requirement of physical *injury* and began to permit recovery for emotional distress associated with mere physical "impacts" — but they continued to require that the impact flow from a danger that was immediate and imminent. *See, e.g., Grube v. Union Pac. R.R. Co.*, 886 P.2d 845, 851 (Kan. 1994) (denying recovery, despite impact, because alleged distress did not result from "imminent apprehension of physical harm").

Recognizing that "'a near miss may be as frightening as a direct hit,'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982)), some courts began to credit ever slighter "impacts." *See, e.g., Porter v. Delaware, L. & W. R.R.*, 63 A. 860, 860 (N.J. 1906) (recovery for fright from bridge collapse where plaintiff alleged "that she was hit on the neck by something, and that dust from the falling debris went into her eyes"). Other courts expanded the impact test into the more frankly capacious zone-of-danger test. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994) ("As courts increasingly adopted the zone of danger test, the need to stretch the definition of physical impact dissipated."). That test "was recognized as being a progressive rule of liability that was less restrictive than the [pure] physical impact test." *Gottshall*, 512 U.S. at 555. As in the original physical-impact cases, however, the "near miss" recognized by the zone-of-danger test is a near miss of imminent

physical harm. *See Buckley*, 521 U.S. at 430-31; *Gottshall*, 512 U.S. at 547-548 & n. 9 (collecting cases).[5]

Buckley reiterated *Gottshall*'s understanding of this history, and of the kinds of harms that emotional-distress recovery is intended to address. Indeed, in concluding that mere exposure to a toxic substance was *not* the sort of "physical impact" that would allow recovery for emotional distress, *Buckley* emphasized that the cases cited by *Gottshall* in adopting the zone-of-danger test all "involved a threatened physical contact that caused, or might have caused, immediate traumatic harm." 521 U.S. at 430-31 (citing cases). Here, however, just as in *Buckley*, respondents' alleged fear that they might develop cancer arises not from any "threatened physical contact" or "immediate traumatic harm," but from exposure to asbestos, over a long period and during routine employment activities, that, it turns out, "might cause a disease at a substantially later time." *Id.* at 430. And just as in *Buckley*, their claim for compensation for that alleged fear is too far removed from the core of the emotional-distress tort to justify recovery under FELA.

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5 *See also, e.g., Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (quoting *Gottshall*, 512 U.S. 548)); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (the zone-of-danger concept requires that a plaintiff show that his "physical safety was imminently endangered"); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965) (zone test limits recovery to situations in which "negligence causes fright from a reasonable fear of immediate personal injury"); *Dulieu v. White & Sons*, 2 K.B. 669, 675 (1901) (distress is compensable only if it "arises from a reasonable fear of immediate personal injury to oneself").

2. Cases Allowing Recovery for Fear of Cancer Based on Asbestos Exposure Go Beyond the Limited Right of Recovery Recognized in *Gottshall* and *Buckley*

Recently, some courts have expanded the emotional-distress tort beyond cases involving threatened traumatic injury and allowed recovery for fear of developing a disease. Those cases are inconsistent with the careful, historically bounded approach adopted by this Court's FELA cases.

In one category of cases, some courts have permitted recovery for fear of cancer or other diseases where the plaintiff has been exposed to toxic substances over long periods of time. In *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), for example, the court permitted emotional-distress recovery for fear of developing cancer in the future from long-term exposure to contaminated drinking water. Similarly, in *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982), the court permitted recovery for fear of cancer and other diseases arising from drinking contaminated water over a period of eight months. *See also Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994) (fear of cancer after occupational exposure to radiation); *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1526 (W.D. Mich. 1987) (fear of cancer from exposure to chemicals leaking from manufacturing plant).

In another category of cases arising in the last two decades, courts have evaluated claims of emotional distress brought by plaintiffs who suffered some potential exposure to the virus that causes AIDS. While these cases allow recovery for a period of distressing uncertainty resulting from such exposure, they bear a close resemblance to traditional emotional-distress cases because they involve a sudden, traumatic harm such as a needle-stick or other specific contact with an infected bodily fluid, giving rise to an immediate (and limited) period of uncertainty and concern before it can be determined whether actual infection has occurred. Indeed,

Buckley cited *Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), a fear-of-AIDS case involving a needle-stick, as a case involving "traumatic injury," and therefore falling "within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437; *see also Faya v. Almaraz*, 620 A.2d 327, 336-37 (Md. 1993) (permitting recovery for the "reasonable window of anxiety" until plaintiff conclusively tested negative for HIV, where doctor performed invasive operation without informing patient that he was HIV-positive); *Hartwig v. Oregon Trail Eye Clinic*, 580 N.W.2d 86, 95 (Neb. 1998) (permitting recovery for fear of AIDS after needle-stick). Moreover, fear-of-AIDS cases are quite different from fear-of-cancer cases involving long-term exposure to toxic substances. After exposure to HIV, "an individual does not become more likely to develop [HIV-infection] in the future; one either acquires the [infection] as a result of the exposure or one does not." Cantley, *Every Dogma Has Its Day: Cancerphobia Precedent in Fear of AIDS Cases*, 40 Brandeis L.J. 535, 552 (2001). The fear-of-AIDS cases accordingly lend no substantial support to the type of claim at issue in this case.

Perhaps the largest category of cases in which courts have expanded emotional-distress recovery beyond the immediate zone of danger of traumatic injury are those involving exposure to asbestos — essentially one variation of the toxic-exposure cases noted above. In *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 528 (Fla. Dist. Ct. App. 1985), for example, the court permitted recovery for fear of cancer where the plaintiff was exposed to asbestos over many years and demonstrated a present physical injury of asbestosis. Similarly, in *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-15 (5th Cir. 1986) (en banc), the court permitted recovery for fear of cancer resulting from asbestos exposure during plaintiff's employment as a shipyard worker. *See also Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986) (fear-of-cancer claim based on asbestos exposure over time and plaintiff's symptoms of pleural thickening);

Farall v. A.C. & S. Co., 558 A.2d 1078 (Del. Super. Ct. 1989).

Because these claims involve fear arising from long-term exposure and an uncertain future harm, rather than emotional trauma resulting from a threat of sudden calamity, they fall well outside the scope of the zone-of-danger test adopted in *Gottshall* and *Buckley* for emotional-distress claims under FELA. In fact, such fear-of claims were completely unknown at the time of FELA's passage in 1908.[6] As the Delaware courts have recognized, asbestos-related injuries bear no resemblance to the kinds of harms traditionally compensated through independent emotional-distress claims, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased. [Thus], [t]he nature of asbestos-related injury, whether considered on an exposure or a manifestation basis is clearly incompatible with the traumatic event requirement for recovery of mental anguish . . . ." *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984); *see also Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (distinguishing "mental anguish engendered by a proven traumatic ordeal which did not result in physical injury" from "mental anguish arising from fear of future complications").

Accordingly, if courts allow recovery for fear of a possible future disease (other than under the traditional rules for pain-and-suffering damages), they should frankly recognize

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6 *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885, 886 (N.C. 1912), is one of the earliest cases that allowed recovery for fear of cancer. But in that case, the plaintiff's fear resulted from a sudden physical impact (an explosion that caused a burn), and in any event what the court allowed was consequential damages for the emotional distress that the plaintiff experienced from fear of future cancer resulting directly from the burn. *See also Ferrara v. Galluchio*, 5 N.Y.2d 16, 21 (1958) (permitting recovery for fear of cancer resulting from X-Ray burn).

that they are creating a new tort. Indeed, some courts have understood and rejected the invitation to do so. *See, e.g., O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (noting that "there is no Oklahoma case law which addresses whether damages may be recovered for the fear of an increased risk of developing cancer later in life," and rejecting such a claim as overly speculative); *see also* Henderson & Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 Univ. S. Carolina L. Rev. ___ (forthcoming Summer 2002). That is the correct approach.

Fear-of-cancer claims compensate plaintiffs for harm directly related to a physical injury (the disease itself) that they may never contract. Moreover, as the Court recognized in *Buckley*, plaintiffs can presumably recover for emotional distress for fear of cancer as an element of pain and suffering *related to cancer*, if and when they in fact contract that disease. *See Buckley*, 521 U.S. at 429-30 (citing *Simmons v. Pacor*, 674 A.2d at 239). Thus, as the Pennsylvania Supreme Court has explained, denying claims for fear of cancer does not mean that individuals who eventually suffer the actual physical injury of cancer are "left without a remedy for their mental anguish." *Simmons*, 674 A.2d at 239. There is accordingly no adequate reason to expand the ability to recover for emotional-distress beyond the traditional "specific categories," amounting to "recovery-permitting exceptions," that this Court recognized in *Buckley* and *Gottshall*.

Finally, unlike conventional emotional-distress claims, which are limited by the need to prove an immediate risk of traumatic harm, fear-of-cancer claims resulting from long-term, possibly toxic exposures have no adequate limiting principle. As *Buckley* recognized, "contacts, even extensive contacts, with serious carcinogens are common." 521 U.S. at 434. And, therefore, as the California Supreme Court has noted, "all of us are potential fear of cancer plaintiffs, provided we are sufficiently aware of and worried about the possibility of developing cancer from exposure to or ingestion of a carcinogenic substance. The enormity of the class of potential plaintiffs cannot be overstated . . . ." *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 812 (Cal. 1993). Fear-of-cancer claims divorced from the longstanding context of imminent traumatic harm thus create just the "specter of unlimited and unpredictable liability," the "potential for a flood of trivial suits," and the "possibility of fraudulent claims" about which *Gottshall* and *Buckley* warned. *Gottshall*, 512 U.S. at 557; *Buckley*, 521 U.S. at 435. As the Supreme Court of Texas has explained:

> A person exposed to asbestos can certainly develop serious health problems, but he or she also may not. The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure cases are serious and which are not. . . . Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared.

Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999).

3. This Court Should Not Redefine Emotional-Distress Recovery Under FELA To Permit Claims for Fear of Cancer

Because fear-of-cancer claims based on asbestos exposure do not fall within the traditional categories of emotional-distress recovery, the real question here, as in *Buckley*, is whether the Court should "redefine" one of the common law's "special recovery-permitting categories" to allow recovery for fear of cancer under factual circumstances like those presented here. 521 U.S. at 436-37. As in *Buckley*, the

proper answer is no — because here, as in *Buckley*, respondents' claim ultimately rests on nothing more than exposure.

The only factual difference between respondents' claims and those presented in *Buckley* is that respondents apparently suffer from asbestosis. On that basis they claim that they have shown "symptoms of a disease," and have therefore "me[t] th[e] requirement[s]" for emotional distress claims set out in *Buckley*. Br. in Opp. 21 (in part quoting *Buckley*, 521 U.S. at 427). But *Buckley* did not hold that asbestosis is a "physical symptom" of cancer. 521 U.S. at 436. If it were, then respondents would have a claim for ordinary damages, including emotional distress, for the injury of cancer — because, as *Buckley* recognized, "[t]he common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom)." *Id.* But although there are various different disease processes that may be associated with asbestos exposure — including pleural thickening, asbestosis, lung cancer, and mesothelioma — there is no established connection among those conditions, and none of them evolves into another. Indeed, a number of courts have recognized that asbestosis and asbestos-related cancers are not medically linked. *See, e.g.*, *Kilpatrick v. Dep't of Labor*, 883 P.2d 1370, 1375 (Wash. 1994); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 117 (D.C. Cir. 1982); *Eagle-Picher*, 481 So. 2d at 522.

Nor did *Buckley* hold that FELA permits emotional-distress recovery for fear of cancer simply because a plaintiff manifests symptoms of some *other* disease, such as asbestosis. To the contrary, it held that exposure to asbestos fibers, which threaten no traumatic harm but only long-term, disease-related risks, does not amount to a "physical impact" (or, *a fortiori*, to the creation of an "immediate risk") so as to authorize recovery for emotional distress under traditional limitations, which the Court adopted for purposes of FELA. *See* 521 U.S. at 428-29, 430, 438. The Court's references to "physical symptoms" served to distinguish Buckley's stand-alone claim for fear of cancer from a claim for fear or other

emotional distress as conventional pain-and-suffering damages incident to a claim for actual, present injury. As we have explained, no such claim for fear of *cancer* lies here, where respondents' only present injury is asbestosis. Accordingly, nothing in *Buckley*'s holding or reasoning supports the conclusion that by merely presenting evidence of asbestosis, respondents satisfy the legal predicates necessary to recover on an independent claim for fear of cancer.[7]

To the contrary, so far as an emotional-distress claim is concerned, asbestosis is merely a proxy for *exposure* to asbestos — which *Buckley* has already held is insufficient to state a claim for fear of cancer under FELA. *See Buckley*, 521 U.S. at 430, 432. Because the presence of asbestosis — the only asserted factual difference between this case and

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[7] One passage in *Buckley* (521 U.S. at 437) does cite *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. Com. Pl. 1987), in which a plaintiff with asbestosis sought emotional distress damages for fear of cancer. *See also* Br. in Opp. 21. The context of the citation in *Buckley* makes clear, however, that the Court cited *Lavelle* merely as an example of a type of case in which the common law conventionally permitted recovery for emotional distress — effectively assuming, without deciding, that *Lavelle* had correctly concluded that the case of an "asbestosis-afflicted plaintiff" fell into "a category where the law already permitted recovery for emotional distress." 521 U.S. 437. In fact, *Lavelle* itself *rejected* a consequential-damages claim for *risk* of cancer, on the sound view that "a plaintiff stricken with asbestosis has no stronger cause of action for cancer than one with *no* disease manifestation at all." 507 N.E.2d at 479. It did permit the plaintiff to "introduce evidence regarding his increased fear of cancer," but on the alternative grounds that (i) "[m]odern tort law" permits recovery for emotional distress without any proof of physical injury, and (ii) the "traditional rule" requiring "physical impact" was satisfied by proof of "a physical contact with the [asbestos] fibers, which initiated [the plaintiff's] physical injuries." *Id.* at 480-81. In the FELA context, *Gottshall* rejected the first of those possible theories of recovery, and *Buckley* itself rejected the second. *Buckley*'s citation and parenthetical description of *Lavelle* are thus best read as a reference to *Lavelle*'s recitation of cases applying the "traditional rule" concerning "physical impact," not as an endorsement of *Lavelle*'s own construction or application of that rule.

Buckley — adds nothing to *Buckley*'s "physical impact" analysis, this case is legally identical to *Buckley* with respect to any independent claim for emotional distress. And because respondents cannot otherwise bring their fear-of-cancer claim within any of *Buckley*'s "special recovery-permitting categories," *id.* at 436-37, *Buckley* dictates reversal of the judgments below.

II. RESPONDENTS CANNOT SHOW THAT THEY HARBOR ANY REASONABLE FEAR OF CANCER FOR WHICH PETITIONER MAY FAIRLY BE HELD RESPONSIBLE

A. Courts Permit Recovery for Emotional Distress Only Where a Plaintiff's Fears Are Reasonable

Gottshall and *Buckley* make clear that in fashioning rules of recovery under FELA, this Court respects the limits that common-law courts traditionally imposed on the availability of damages for emotional distress. *See Gottshall*, 512 U.S. at 543-44; *Buckley*, 521 U.S. at 429-32. As we have shown, the fear-of-cancer damages claimed in this case are not consistent with the "physical impact" or "zone of danger" limitations at issue in those cases. There is also, however, another restriction that courts have imposed on emotional-distress claims, and that respondents' fear-of-cancer claims cannot satisfy: To be compensable, a plaintiff's alleged fear must be *reasonable*.

In cases alleging negligent infliction of emotional distress, "[t]here is no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circumstances." *Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *see also Payton v. Abbott Labs.*, 437 N.E.2d 171, 179 (Mass. 1982); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970) ("[S]erious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."). Unlike in cases involving unexpected or even unforeseeable physical

injuries, in which defendants must typically take plaintiffs as they find them (*see, e.g., Restatement (Second) of Torts* § 461 (1965)), in cases alleging emotional harm a "defendant's standard of conduct is measured by the reactions to be expected of normal persons. Ordinarily, one does not have a duty to be careful not to shock or frighten people. Activity may be geared to a workaday world rather than to the hypersensitive." 3 Harper, James & Gray, *The Law of Torts* 691 (2d ed. 1986); *see also Daley*, 179 N.W.2d at 395.[8] The application of such an objective standard provides an appropriate check on claims for emotional distress, particularly in light of courts' traditional concerns about allowing such claims at all.

The reasonableness standard applies to fear-of-cancer claims just as it does to other claims of emotional distress. *See Potter*, 863 P.2d at 811; *id.* at 810 ("[A] toxic exposure plaintiff is required to establish the reasonableness of his or her fear of cancer."); *Day v. NLO*, 851 F. Supp. at 878 ("mere exposure" is not enough to state a claim for fear of cancer from radiation; in order to demonstrate that "apprehensions of developing cancer are reasonable," plaintiffs must "present evidence which includes the risk of cancer"). Plaintiffs claiming fear of cancer accordingly bear the burden of demonstrating that their fears are not only subjectively genuine, but also objectively reasonable under all the circumstances of their particular cases. *See Potter*, 863 P.2d at 810-

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[8] *See also Marchica*, 31 F.3d at 1206 ("Where a claim of emotional distress is founded on the fear of developing a disease, the plaintiff must exercise due diligence to become familiar with the realities of the disease and the defendant should not be held liable for emotional distress to the extent the plaintiff's fear is based on ignorance."); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1568-70 (D. Haw. 1990); *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688, 696 (E.D. Ark. 1959) ("The mental anguish suffered, to be the basis for an allowance of damages, must be real and with cause and not merely the result of a too sensitive mind or morbid imagination.").

11.[9] "A carcinogenic, or other toxic ingestion or exposure, without more, does not provide a basis for fearing future physical injury or illness which the law is prepared to recognize as reasonable." *Id.* at 811. Indeed, manageable limits on liability are particularly critical in the context of fear-of-cancer claims, to avoid the "tremendous societal cost of otherwise allowing emotional distress compensation to a potentially unrestricted plaintiff class." *Id.* at 812; *see also Buckley*, 521 U.S. at 435 (in cases involving potentially carcinogenic exposures, "[t]he large number of those exposed and the uncertainties that may surround recovery . . . suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability'").

B. Fear of Cancer Should Not Be Deemed Legally Reasonable Under FELA Unless the Plaintiff Is More Likely Than Not To Develop Cancer

The requirement that emotional distress, including fear of cancer, be "reasonable" is not self-defining.[10] The need to give the standard appropriate content is, moreover, both particularly vexing and particularly important in fear-of-cancer cases, for reasons that the Court described in *Buckley*, 521 U.S. at 434-35:

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[9] The reasonableness requirement is distinct from the requirement of a physical manifestation, or other objective proof of emotional injury, principally discussed in the petition (*see* Pet. 13-19). The manifestation requirement ensures that alleged emotional harm is *genuine*. The reasonableness requirement defines limits to the defendant's duty, and precludes recovery for unreasonable fear or distress even if it *is* genuine. *Cf. Buckley*, 521 U.S. at 436-38 (distinguishing question of genuineness from categorical limitations on recovery).

[10] The jury instructions in this case, for example, indicated that respondents were entitled to damages for any "reasonable fear of cancer . . . related to proven physical injury from asbestos," but they gave the jury no guidance in determining either what fears are legally "reasonable," or how fear of cancer could be medically "related" to respondents' abestosis. *See* J.A. 573.

> [C]ontacts, even extensive contacts, with serious carcinogens are common. . . . The relevant problem . . . [is therefore] one of evaluating a claimed emotional reaction to an *increased* risk of dying [arising from the particular exposure that is the basis of the plaintiff's suit.] An external circumstance — exposure — makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated — particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics?

Many courts considering fear-of-cancer claims seem to have confused the question whether such fear is reasonable with the question whether the underlying toxic exposure has given rise to any physical injury — such as asbestosis — for which the plaintiff is entitled to some present recovery. *See, e.g., Jackson*, 781 F.2d at 414 ("Jackson's distress is accompanied by a present *physical* injury: He has asbestosis."); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 499 (N.J. Super. Ct. 1985) (permitting emotional-distress recovery for fear of cancer because plaintiffs were suffering from asbestosis); *Eagle-Picher*, 481 So. 2d at 527-28 (adopting physical-injury rule for fear-of-cancer claims and permitting recovery for plaintiff with asbestosis); *Landry v. Florida Power & Light Corp.*, 799 F. Supp. 94, 96-97 (S.D. Fla. 1992) (denying recovery for fear of cancer because plaintiff failed to show symptoms of any disease). Such cases typically cite evidence of asbestosis (or another non-cancerous condition, such as pleural thickening) to satisfy the "physical impact" or "zone of danger" requirement of emotional-distress law. *See, e.g., Herber*, 785 F.2d at 85; *Devlin*, 495 A.2d 495, 497-99 (foreseeable exposure put plaintiffs in the "zone of risk," and

asbestosis was sufficient to show the "[i]mmediate and direct physical impact and injury" necessary to establish an emotional-distress claim) (in part quoting *Ayers v. Jackson Twp.*, 461 A.2d 184, 189 (N.J. Super. Ct. 1983)). As discussed above, however, that is a misapplication of the common law's "special recovery-permitting categories." *Buckley*, 521 U.S. at 437. The analogy to "impact" (or "danger") in an asbestos case would be the asbestos exposure, not any physical condition that might result from that exposure — and *Buckley* already refused to accept that analogy. *See id.*

Some cases do focus at least in part on the theory that a present injury of asbestosis makes it more likely than it otherwise would be that a particular plaintiff who has been exposed to asbestos will eventually develop cancer. *See Eagle-Picher*, 481 So. 2d at 528-29 ("[A]lthough asbestosis and cancer are not medically linked in that asbestosis does not cause cancer, . . . plaintiffs with asbestosis may have a well-founded greater reason to fear contracting cancer than those who do not have asbestosis."). That theory is at least logically related to a question that courts *should* be asking, which is whether a plaintiff's asserted fear of cancer is reasonable. But if that is the question, it makes more sense to ask it directly, and to supply a legal standard for answering it.

One leading case that does address the question directly is the California Supreme Court's decision in *Potter*. The plaintiffs lived near a landfill in which the defendant had disposed of carcinogenic wastes. 863 P.2d at 801. None of the plaintiffs actually suffered from any cancerous or pre-cancerous condition, but each faced "an enhanced but unquantified risk of developing cancer in the future due to the exposure." *Id.* The court first concluded that there was insufficient evidence in the record to determine whether the plaintiffs had suffered any present physical injury that might allow recovery for anxiety as an element of ordinary damages, if the anxiety were "specifically due to a reasonable fear of a future harm attributable to the injury . . . ." *Id.* at 805-07; *see*

pp. 5-7, *supra*. It then held that it would consider the plaintiffs' claims for negligent infliction of emotional distress without regard to the traditional requirement that they show that the distress arose from a physical impact or near miss caused by the defendant. *Id.* at 808-10.

The court clearly recognized, however, that "permitting recovery for fear of cancer damages based solely upon a plaintiff's knowledge that his or her risk of cancer ha[d] been significantly increased by a toxic exposure, without requiring any further showing of the actual likelihood of the feared cancer due to the exposure, [would] provide[] no protection against unreasonable claims based upon wholly speculative fears." *Id.* at 811. It also took account of, among other things, the nearly universal exposure to carcinogens in the modern world, and the "tremendous societal cost of . . . allowing emotional distress compensation to a potentially unrestricted plaintiff class," *id.* at 812; the possibility that "allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual physical injury and those who ultimately develop cancer," *id.* at 813; the need to "establish a sufficiently definite and predictable threshold for recovery to permit consistent application from case to case," *id.*; and the need to "limit the class of potential plaintiffs if emotional injury absent physical harm is to continue to be a recoverable item of damages," *id.* at 814 (internal quotation marks and citation omitted). The court concluded that in a stand-alone claim for fear of cancer, plaintiffs should be able to recover only for fear that "stems from a *knowledge*, corroborated by *reliable medical or scientific opinion*, that it is *more likely than not* that [they] will develop . . . cancer in the future due to the toxic exposure." *Id.* at 816 (emphasis added); *see also Barron*, 868 F. Supp. at 1211.

The concerns that led the *Potter* court to adopt a more-likely-than-not standard to test the legal reasonableness of fear-of-cancer claims apply with equal force to similar claims under FELA. As this Court recognized in *Buckley*, cases involving exposure to potentially carcinogenic substances pre-

sent serious claim-evaluation problems, and "[t]he large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability.'" *Buckley*, 521 U.S. at 435 (quoting *Gottshall*, 512 U.S. at 557); *see also id.* at 433 (citing *Potter*'s standard), 433-36 (discussing reasons for restricting emotional-distress liability). Accordingly, in the unlikely event that respondents' claims survive scrutiny under *Buckley* itself, they should in any event fail because the more-likely-than-not standard should apply under FELA to implement the requirement that emotional-distress claims be legally reasonable. *See* J.A. 573 (jury instructions) ("[N]one of the plaintiffs ha[s] offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future.").

C. Courts Cannot Reasonably Impose on Defendants a Duty To Protect Plaintiffs From Speculative Fears Concerning Cancer — Particularly Where Background Risks and a Plaintiffs' Own Conduct, Such as Smoking, Give Much Greater Cause for Concern

Finally, it bears emphasis that a finding of liability in a negligence case involves a declaration by the courts that the defendant had a legal duty to conduct itself so as not to impose on the plaintiff a particular harm. *See, e.g.*, Green, *Duties, Risks, Causation Doctrines*, 41 Tex. L. Rev. 42, 45-46 (1962) ("At the base of *every* tort case in which liability is imposed on a defendant, there *must* be a duty. . . . Further, the duty issue, for purposes of litigation, should always be stated specifically: Does the defendant's duty, whatever it may be, extend to the specific injury which the victim has received?"). Here, the necessary implication would be that petitioner had a duty to respondents not only to avoid causing them any actual physical injury through exposure to asbestos, but also to protect them from fear or worry that such exposure might ultimately cause them to develop cancer. As

Dean Green recognized, "[t]he determination of the issue of duty and whether it includes the particular risk imposed on the [plaintiff] ultimately rests upon broad policies which underlie the law." *Id.* at 45. The Court took account of just such policies in adopting appropriately limited rules of FELA liability in *Gottshall* and *Buckley*. Similar caution is appropriate here. In the present case, moreover, any holding of liability or duty would be particularly remarkable in the case of the five (out of six) respondents who are or were smokers. *See* Br. in Opp. 5-6.

Medical testimony at trial indicated that respondents' exposure to asbestos put them at greater risk for cancer; that respondents suffered from asbestosis or a related lung condition; and that with respect to lung cancer, there was a potential "synergy" between smoking-related and asbestos-related risks. *See* Br. in Opp. 4-5; J.A. 97. The first point, as we have explained, is insufficient to support emotional-distress recovery after *Buckley*. Asbestosis, while sometimes responsible for significant health impairment in its own right, does not progress to or evolve into cancer. And any "synergy" is, by definition, as much the result of smoking as of asbestos exposure. The trial court nonetheless instructed the jury that if it found that respondents had suffered any physical injury from asbestos, it could award them damages for "fear of cancer." J.A. 573.

That is not sensible legal policy, either in general or, particularly, here. As petitioner points out (*see* Pet. Br. 25), individuals in the United States unfortunately have a substantial *background* risk of contracting and dying from some form of cancer. Thus, even a non-smoking plaintiff who alleges a fear of getting cancer *from asbestos* cannot plausibly claim to be starting from a position of complete unconcern. The question is reasonable, *incremental* fear. Moreover, while asbestos exposure may cause either mesothelioma or lung cancer, the former is quite rare. *See id.* at 25. And as petitioner's summary of the medical literature demonstrates (*see id.* at 23-24), asbestos exposure, even when greater than

that experienced by respondents, likely produces only a moderately increased risk of lung cancer. Thus, a typical non-smoker, with a lung-cancer risk of approximately one percent, would likely have a risk of at most a few percent even after significant asbestos exposure. *See id.* at 24-25.

The case for incremental risk — or, more precisely, incremental fear — is even less convincing when, as is common, an asbestos fear-of-cancer plaintiff is or has been a smoker. *See id.* 23-35. Cigarette smoking is, of course, the overwhelmingly dominant cause of lung cancer. *See, e.g.*, Cagel, *Criteria for Attributing Lung Cancer to Asbestos Exposure*, 117 Am. J. Clin. Path. 9, 9 (2002) ("[A]bout 90% of all lung cancers are caused by tobacco smoking."). Asbestos exposure may increase a smoker's chance of contracting lung cancer, although on this point, as *Buckley* predicted would often be the case, "the relevant statistics themselves are controversial and uncertain." 521 U.S. at 435; *see* Pet. Br. 22-24. But in light of the myriad deleterious health effects of smoking, and the fact that any "synergy" of risks would not exist without the smoking risk, it seems clear that any *fear* of lung cancer that a smoker might experience cannot reasonably be separated from that dominant risk factor, or attributed to an asbestos defendant as a matter of tort-law duty.[11]

For present purposes, the available medical evidence marshaled by petitioner suggests two important points. First, a non-smoker with asbestos exposure will have only a small chance of contracting cancer from that exposure. Second, a smoker will have a significant risk of lung cancer (and various other health problems) even without exposure to asbestos, and the risk added by such exposure is small. In the first case it is implausible to claim that the asbestos exposure has caused a plaintiff to have any particular, reasonable fear of developing cancer. In the second, it is implausible to claim that any fear the plaintiff may feel is fairly attributable to asbestos. In either event, it would be inappropriate to hold that the individual's former employer has breached a legal duty to avoid exposing its employees to unreasonable fears.

[11] It is not an adequate response to purport to reduce a plaintiff's "fear of cancer" damages by some percentage to account for the "comparative fault" of smoking. *See* Br. in Opp. 6. Valuing a plaintiff's "fear" for purposes of awarding damages is an uncertain task in the first place. Attempting to assess what portion of a smoker's fear of cancer could or should be attributed to asbestos exposure takes the exercise well into the realm of speculation.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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IN THE

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NORFOLK & WESTERN RAILWAY COMPANY,
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FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae Association of American Railroads (AAR) is an incorporated, non-profit trade association representing the nation's major freight railroads and Amtrak. The AAR incorporates by reference the *Statement of Interest* set forth in its Brief in Support of the Petition for *Certiorari* in this case.

AAR urges the Court to interpret the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, to limit recovery for

[1] No person or entity other than AAR has made monetary contributions toward this Brief and no counsel for any party authored this Brief in whole or in part. Letters of consent by the parties to the filing of this Brief have been filed with the Court.

emotional distress damages related to cancer to cancer victims who display physical manifestations of severe emotional distress, and to require apportionment of damages in FELA cases.

SUMMARY OF THE ARGUMENT

In order to recover damages for negligently inflicted emotional distress under FELA, a plaintiff must demonstrate (1) that the railroad's negligence placed him in a "zone of danger", and (2) some objective evidence of emotional distress. Respondents failed to meet either element with respect to their fear of cancer claims.

First, Respondents have not suffered any "physical impact" related to cancer. This Court has held that asbestos exposure alone does not constitute physical impact. Although Respondents suffered the "physical impact" of asbestosis, that disease process is completely unrelated to cancer, and thus cannot serve to place Respondents in the "zone of danger" for developing cancer. Second, Respondents provided no objective evidence that they actually suffered any cognizable emotional distress as a result of their alleged fear of cancer. Respondents' fear of cancer claims therefore fail as a matter of law.

The court below instructed the jury to make no reduction of damages for the contribution of other causes to Respondents' alleged injuries. This was inconsistent with FELA, which entitles a defendant to an apportionment instruction. The statutory language, as well as the policy and intent that underlie FELA, require that a railroad employer is liable only for those damages caused by its negligence. This Court should enunciate a clear rule which will require FELA juries to apportion damages among different causes of a plaintiff's injury when there is a reasonable basis for doing so, and hold a defendant liable only for that portion of the damages caused by its negligence.

ARGUMENT

I. PLAINTIFFS CANNOT RECOVER FOR EMOTIONAL DISTRESS DAMAGES RELATED TO CANCER UNLESS THEY HAVE CANCER AND SUFFER PHYSICAL MANIFESTATION OF SEVERE EMOTIONAL DISTRESS.

In the last ten years, this Court recognized that the tort of negligent infliction of emotional distress is cognizable under FELA, but twice placed strict limits on the availability of damages. In *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Court held that proof of genuineness of emotional distress was not sufficient to establish a claim; rather, a FELA plaintiff must first demonstrate availability by showing that his distress resulted from his having been within a "zone of danger" by virtue of either a "physical impact" or "the immediate risk of physical harm". *Id.* at 547-548.

The Court's application of the "availability" test has twice prevented recovery. In *Gottshall*, the emotional distress claims of both plaintiffs[2] failed because the plaintiffs were not within the zone of danger.[3] Three years later, in *Metro-North Com-*

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[2] The *Gottshall* plaintiffs' symptoms included nervous breakdown, inpatient and outpatient psychiatric treatment, forty-pound weight loss, nausea, insomnia, cold sweats, nightmares, suicidal preoccupations and anxiety, major depression and posttraumatic stress disorder. *See Gottshall*, 512 U.S. at 563-564, 566-567.

[3] The Court itself determined that one plaintiff, who claimed that his emotional distress resulted from stressful workplace conditions, was not within the zone of danger because there was no threat or evidence of physical harm. 512 U.S. at 558. The other case was remanded to the Third Circuit, which concluded that that plaintiff, who witnessed the on-the-job death of a coworker, was not in the zone of danger because his working conditions were not "extreme and dangerous enough as to place [him] in immediate risk of physical harm." *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995).

muter R.R. v. Buckley, 521 U.S. 524 (1997), the Court held, with regard to asbestos exposure and fear of disease claims, that

> the "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time - where that substance, or related circumstance, threatens no harm other than that disease-related risk,

id. at 430, and thus denied recovery for emotional distress to an asymptomatic plaintiff "unless, and until, he manifests symptoms of a disease." *Id.* at 427.

This case presents two "fear of cancer" issues left open in the *Buckley* case: (1) Does the "physical impact" of asbestosis place a FELA plaintiff within the zone of danger for cancer? (2) Can plaintiffs who testify only to vague concerns related to cancer, but offer no evidence of physical symptoms of serious emotional distress, recover for negligent infliction of emotional distress under FELA? FELA is silent on both issues; thus, the Court's "duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall,* 512 U.S. at 558 (Souter, J., concurring). The "evolving common law" of both FELA emotional distress and "the elephantine asbestos litigation", *Ortiz v. Fibreboard,* 527 U.S. 815, 821 (1999), requires reversal of the court below.

A. An asbestos-exposed plaintiff who has not been diagnosed with cancer is not within the "zone of danger" for cancer, and therefore cannot recover for negligently inflicted emotional distress.

It is well-established that the same asbestos exposure can cause different diseases, both non-malignant (asbestosis and pleural thickening) and malignant (mesothelioma, lung cancer, and "certain 'other cancers'"). *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 603 (1997). A plaintiff who develops any one of these diseases as a result of a railroad's negligence can recover the full range of damages related to that disease,

including emotional distress or mental anguish related to fear of the disease, as a component of pain and suffering. *See Gottshall,* 512 U.S. at 544. Respondents' claims for fear of cancer are separate from their pain and suffering claims related to asbestosis; because Respondents do not have cancer, their claims are in the nature of negligent infliction of emotional distress or mental anguish, requiring them to prove that Petitioner's negligence resulted in either a "physical impact" or "immediate risk of physical harm", placing them in the zone of danger for cancer.

Buckley makes clear that the only legally cognizable impact Respondents have suffered is the onset of asbestosis. It is equally clear that it is not the asbestosis which places Respondents at risk for cancer. Rather, it is the asbestos exposure—*not* a physical impact, according to *Buckley*—which might—or, more likely, will not—someday result in Respondents developing cancer. The alleged fears of these Respondents, who have asbestosis but not cancer, are no less based on speculation than those of asymptomatic plaintiffs like Buckley; thus, they cannot meet the availability threshold. An examination of the evolving common law demonstrates why this is so.

1. *Asbestosis and asbestos-related cancer are separate injuries.*

Courts dealing with asbestos cases have uniformly concluded, based on unrefuted medical and scientific evidence, that each of the many asbestos-related diseases, although it may develop from the same exposure, is separate and distinct. *See, e.g., Kilpatrick v. Dep't of Labor*, 883 P.2d 1370, 1375 (Wash. 1994) ("Each asbestos-related disease involves a unique pathology . . . and is not, in fact, an aggravation or continuation of a different asbestos-related condition"); *Eagle-Picher Indus., Inc. v. Cox*, 481 So.2d 517, 522 n. 7 (Fla. 1985) (". . . asbestosis and cancer can be . . . considered distinct sibling diseases parented by the same cause . . ."). The recognition of the pathological

distinctions between these diseases has led to widespread application of a "separate-injury" analysis, which provides that each disease which results from asbestos exposure—even the same exposure—is a separate injury for statute of limitations and/or issue preclusion purposes. Justice Ginsburg, then a Circuit Court Judge, applying District of Columbia law, authored the first appellate court opinion recognizing this separation. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982). At least 22 other courts, applying state tort or workers' compensation law, have followed suit,[4] and at least two states have also adopted a form of the separate-injury rule by statute. *See* Ala. Code § 6-2-30(b); Ind. Code § 34-20-3-2(a)(2). Although there are no reported FELA decisions[5]

[4] *See Nelson v. Indus. Comm'n of Ariz.*, 656 P.2d 1230 (Ariz. 1982); *Hamilton v. Asbestos Corp.*, 998 P.2d 403 (Calif. 2000); *Miller v. Armstrong World Industries, Inc.*, 917 P.2d 111 (Colo. 1991); *Capen v. Gen. Dynamics Corp.*, 659 A.2d 735 (Conn. App. 1995); *Sheppard v. A.C.&S. Co.*, 498 A.2d 1126 (Del. Super. 1985); *Eagle-Picher v. Cox*, 481 So. 2d 517 (Fla. 1985); *Fulmore v. CSX Transp., Inc.*, 557 S.E.2d 64 (Ga. App. 2001); *VaSalle v. Celotex Corp.*, 515 N.E.2d 684 (Ill. App. 1987); *Parks v. A. P. Green Indus., Inc.*, 754 N.E.2d 1052 (Ind. App. 2001); *Wilber v. Owens-Corning Fiberglass Corp.*, 476 N.W.2d 74 (Iowa 1991); *Carroll v. Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699 (Ky. 2000); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020 (Md. 1983); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1 (Mich. 1986); *Stillson v. Peterson & Hede Co.*, 454 N.W.2d 430 (Minn. 1990); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. 1985); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856 (N.Y.Misc. 1989); *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145 (Pa. 1996); *Potts v. Celotex Corp.*, 796 S.W.2d 678 (Tenn. 1990); *Pustejovsky v. Rapid-American Corp.*, 35 S.W.2d 643 (Tex. 2000); *Kilpatrick*, 883 P.2d 1370 (Wash. 1994); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wisc. 1999).

[5] A number of trial courts have, in unreported orders, granted motions *in limine* similar to the one denied by the trial court below. Copies of these motions have been lodged with the Court. The order of the U.S. District Court for the Southern District of Georgia which specifically held that "[c]ancer and asbestosis are separate and distinct diseases" was recently affirmed on other grounds by the Eleventh Circuit. *See Jones v. CSX Transp., Inc.*, 287 F.3d 1341 (11th Cir. 2002).

dealing with the separate-injury distinction, the *Wilson* analysis has been adopted in a Jones Act case. *Wagner v. Apex Marine Ship Mgt. Corp.*, 100 Cal.Rptr.2d 533, 539 (Cal. App. 2000), *rev. denied*, 2001 Cal. LEXIS 50 (Cal. 2001).[6]

2. *The common law separate-injury rule provides for full recovery for each distinct asbestos-related injury, reduces speculative claims, preserves finite resources for those who develop disease, and should be adopted in FELA cases.*

The courts cited *supra* understood that the recognition of legally distinct injuries—and thus separate causes of action - for the various "sibling diseases parented by the same asbestos exposure" is an important component of the judicial response to "the asbestos litigation crisis". *See Amchem*, 521 U.S. 591, 597 (1987). The pioneer courts in the asbestos cases were required to grapple with the pathology of separate diseases, long latency periods and constantly emerging epidemiological information about risks, and to tailor traditional tort rules to these unique aspects of asbestos litigation. The competing policies of providing injured plaintiffs with full recovery, denying speculative claims, and preserving finite resources for individuals who might yet become sick, have been evaluated and re-evaluated throughout this period.

The *Wilson* case is an excellent demonstration of the pioneer courts' efforts to balance these competing interests. That decision squarely rejected the notion that an asbestotic can sue "not only for asbestosis, but for consequences that might develop later, including separate and distinct illnesses such as mesothelioma or another form of cancer," *Wilson*, 684 F.2d at 117, concluding that a plaintiff could not, and should not, recover in an asbestosis suit for damages related to cancer which

[6] The Jones Act incorporates the substantive provisions of FELA, and precedent under one Act governs cases brought under the other. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

would likely never develop. The court held that even if the likelihood of later disease were greater than 50%, it was nonetheless inequitable to allow increased risk claims in asbestos cases because "[p]ersons who contract the first, but not the second, disease will receive a windfall and, in the aggregate, the defendant will overcompensate the injured class." *Id.* at 346 n. 45.

The *Wilson* separate-injury analysis strikes a sound balance between competing policies. Its adoption would enable Respondents to recover all damages resulting from their asbestosis, but would permit no present recovery related to a disease they do not have. If any Respondent develops cancer, he would be able to sue again, and seek recovery for all cancer-related damages, including emotional distress. The rule allows for full recovery, requires no speculation, and does not provide compensation for diseases Respondents do not have and may never develop.

Unfortunately, in the years before the *Buckley* case, even courts adopting the *Wilson* analysis incongruously allowed asbestotics to recover for fear of cancer. For example, in *Cox*, the court adopted the separate-injury rule and policy based on its concern about "[t]he speculative nature of the prediction of future damages."[7] *Id.* 481 So.2d at 524, *citing Wilson*, 684 F.2d 111. Anticipating the explosion of asbestos litigation, the court correctly concluded that asbestotics cannot recover for increased risk of cancer:

> Given the immensity of the demands made and yet to be made upon asbestos litigation defendants, the finite resources available to pay claimants in mass tort litigation, and the real danger that over-compensation of early claimants who may not contract cancer will deplete those finite resources to the detriment of future claimants who do, public policy requires that the resources available for those persons who do contract cancer not be awarded to those whose exposure to asbestos has merely increased their risk of contracting cancer in the future. . . .

[7] The court specifically noted that it was not important to determine what degree of certainty was "reasonable" for purposes of predicting future damages: "It is, no matter what the required quantum of proof, a prediction." *Id.* at 524 n.10.

Cox, 481 So.2d at 525-526. Despite the court's reservations about the speculative nature of awarding damages for *risk* of cancer, it nonetheless allowed recovery for *fear* of cancer, reasoning that the "physical impact" of inhalation of asbestos placed the plaintiff within the "zone of danger" for recovery. *Id.* at 526-527.

Seventeen years later, it is obvious that the *Cox* court—and the court below, J.A. 573—drew the line in the wrong place. The concerns about huge demands, finite resources, and "the real danger that over-compensation of . . . claimants who may not contract cancer will deplete those finite resources to the detriment of . . . claimants who do," *id.* at 526, combined with the logic of the separate-injury analysis, are best addressed by a line drawn between damages related to the disease the *Cox* plaintiff had—asbestosis - and damages related to the disease he did not have and likely never developed—cancer. Asbestos suits have indeed exploded, resulting in widespread bankruptcies.[8] Allowing recovery for fear of cancer no doubt contributed to this disaster. Most who recovered for fear of cancer never got the disease; many who now have it are denied recovery because the defendants who paid fear of cancer damages are no longer solvent. These developments, and this Court's decision in *Buckley*, demand that the line belongs elsewhere in FELA cases.

[8] *See* Brief of *Amici Curiae* Coalition for Asbestos Justice, *et al.*, Part II. A.

3. *This Court's* Buckley *decision precludes recovery for negligent infliction of emotional distress by those who have not developed the disease they fear.*

The *Buckley* decision and the separate-injury rule foreclose the notion that fear of cancer damages are available to an asbestotic simply because he has suffered the "physical impact" of asbestos exposure. *First*. *Buckley* unequivocally held that asbestos exposure is not a "physical impact", even though it results in increased risk of disease. 521 U.S. at 430. Exposure alone cannot entitle Respondents to any recovery based on their fear of contracting cancer. *Second*. The Court noted that "the law . . . does permit recovery for emotional distress where that distress accompanies a physical injury," *id.* at 430, citing *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), a case which limited recovery of cancer-related emotional distress to persons who actually have cancer. *Third*. The Court emphasized that a disease-free plaintiff would not fall under the common-law rule "permit[ting] a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress.," *id.* at 432 [emphasis added], citing back to its discussion of *Simmons*. *Fourth*. The "physical impact" of asbestosis is medically irrelevant to the development of cancer. Asbestotics may or may not develop cancer; cancer victims may or may not have asbestosis. *Fifth*. An asbestotic's fear of developing cancer from his asbestos exposure is no less based on speculation than that of a heavily-exposed asymptomatic worker like Buckley.

The court below disregarded the *Buckley* analysis. Instead, it transformed *Buckley*'s holding that "*a* disease" is an essential prerequisite to recovery under any of the "special categories" of exceptions to the bar on recovery of emotional distress damages, *Buckley*, 521 U.S. at 429, into an unsupportable holding that "*any* disease" resulting from asbestos exposure constitutes a "physical impact" under the *Gottshall* test, thus allowing a worker exposed to a carcinogen to recover for fear of cancer

when he develops any exposure-caused condition, however unrelated to cancer. The three "general policy reasons" cited by the Court in *Buckley*, 521 U.S. at 434, in addition to the oft-expressed concerns about the asbestos litigation crisis, do not support this strained interpretation.

4. *Adoption of a bright-line standard that allows only plaintiffs with cancer to recover for cancer-related emotional distress is the only resolution consistent with the law and policy of* Buckley.

The adoption of a bright-line standard—no cancer, no recovery for cancer emotional distress—accomplishes the same result as the *Buckley* "no disease, no recovery for emotional distress" bright-line standard. Such a rule will eliminate the "special 'difficulty for judges and juries' in separating valid, important claims from those that are invalid or 'trivial.'" *Buckley*, 521 U.S. at 433. Moreover, the limitation of cancer emotional distress claims to cancer victims relieves judges and juries of the impossibly subjective task of choosing which fears are reasonable, which fears are related to asbestosis, and which fears are held universally by all who worry about getting cancer.

Denying fear of cancer recovery to plaintiffs without cancer will also reduce the "threat of 'unlimited and unpredictable liability'" to the nation's railroads. *Id.* at 435. In the non-FELA context, widespread recovery for fear of cancer has no doubt contributed to the bankruptcies of asbestos manufacturers. The judicial concern that finite resources would be depleted by awarding those who do not develop cancer at the expense of those who do already has come to pass for the thousands of cancer victims who were not diagnosed before the bankruptcies occurred. The adoption of the "no cancer, no recovery" rule for

FELA will prevent the same disaster for railroad workers and their employers, which have become, in the wake of the manufacturers' bankruptcies, a prime target for asbestos suits.[9]

Finally, denying recovery for fear of cancer to plaintiffs without cancer will at least lessen "the 'potential for a flood' of comparatively unimportant, or 'trivial' claims." *Id.* This Court has recognized that plaintiffs suing for future consequences are far different from plaintiffs who are already sick. *Ortiz*; *Amchem*. The practice of inserting fear of cancer into the cases brought by those who have not developed the disease has answered the question posed by the Court in *Buckley*, 521 U.S. at 435-436:

> In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?

The answer to the question is a resounding "YES".

5. *The post-*Buckley *law and policy deny recovery for fear of cancer to those who have not developed the disease.*

Courts faced with asbestotics seeking recovery for fear of cancer since the *Buckley* decision have adopted a bright-line standard which denies these claims. In 1997, the Pennsylvania Supreme Court confirmed that it would no longer allow recovery for increased risk and fear of cancer where a plaintiff suffered from asbestosis, but not cancer:

> We [have] held that a plaintiff asserting a non-cancer, asbestos-related claim could not recover for any part of the damages relating to cancer. This holding abolishes claims

[9] Asbestos suits accounted for about 23.7 percent of all FELA suits filed from 1996-2000, and an incredible 45.2 percent of all FELA suits filed in 2000. Data compiled from AAR surveys of railroads.

> for . . . fear of cancer where cancer is not present, thus eliminating the recovery of damages based on a speculative future event, the possible occurrence of cancer.

Cleveland v. Johns Manville Corp., 690 A.2d 1146, 1150 (Pa. 1997), *citing Simmons*, 674 A.2d 232 (Pa. 1996) (holding that asymptomatic asbestos plaintiff could not recover for fear of cancer).

Based on similar analysis, and this Court's decision in *Buckley*, the Georgia Court of Appeals has held in a FELA case: "Under Georgia law, and the United States Supreme Court's ruling in *Metro-North Commuter R. Co. v. Buckley, supra* a plaintiff may not recover for emotional distress arising from a fear of contracting a disease until he begins to manifest symptoms of *the* disease." *Fulmore v. CSX Transp., Inc.*, 557 S.E.2d 64, 75 (Ga. App. 2001) [emphasis added].

Allowing fear of cancer recovery for plaintiffs without cancer expands the scope of FELA liability in direct contravention to the policies expressed in *Gottshall* and *Buckley*. The Court must take this opportunity to clarify the FELA rule to preclude fear of cancer claims by those who don't have cancer. The strict limitations placed by this Court on recovery of emotional distress damages, the uniformly accepted separate-injury analysis, the policies in favor of full recovery and opposed to speculative damages, the evolving common law, and the concerns raised by the asbestos litigation crisis all support a decision by this Court which would (1) adopt the separate-injury rule for FELA cases, allowing plaintiffs a separate cause of action for each distinct asbestos-related disease they develop, and (2) limit emotional distress damages to those related to the plaintiff's diagnosed disease. Therefore, this Court should hold, as a matter of law, that Respondents without cancer cannot recover emotional distress damages related to cancer, including those for fear of getting cancer in the future.

B. Respondents' claims also fail because they have submitted no objective evidence of severe emotional distress related to their alleged fear of cancer.

AAR urges the Court to adopt the separate-injury rule, which will result in both a denial of Respondents' emotional distress claims related to cancer and a preservation of a cause of action for all damages related to cancer if they later develop asbestos-related cancer. Therefore, this Court should address the merit issue in this case and, in accordance with the arguments in Petitioner's brief, hold that FELA plaintiffs must demonstrate physical manifestations of severe emotional distress in order to recover. Adoption of this rule is in keeping with this Court's limitation of FELA emotional distress damages in *Gottshall* and *Buckley* in light of the policy of ensuring recovery only for meritorious claims.

II. THIS COURT SHOULD ESTABLISH A RULE REQUIRING APPORTIONMENT OF DAMAGES IN FELA CASES WHENEVER THERE IS A REASONABLE BASIS FOR DOING SO

Railroads pay a substantial amount each year to compensate employees under FELA.[10] This is largely the result of the liberal damages available under FELA[11] and the impact of this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352

[10] During the five year period from 1996 through 2000, railroads paid out an average of three-quarters of a billion dollars annually to FELA claimants.

[11] Under FELA, damages are uncapped and a damage award will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2nd Cir. 1993). In contrast, under the workers' compensation laws, compensation awards are based on a percentage of the average wages with a maximum limit. A. Larson & K. Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2000 ed.).

U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), which held that FELA cases are to be submitted to the trier of fact if there is any evidence that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. Moreover, many courts, such as the court below, have misinterpreted *Rogers* to promote and maximize recoveries far beyond what was intended by this Court in *Rogers* or by Congress in enacting FELA.

Respondents alleged that they were negligently exposed to asbestos-containing products while employed by the railroad which caused them to suffer harm. It was established that two Respondents were exposed to asbestos-containing products—for a far greater period—during their employment at non-railroad jobs. Given this evidence, and the policy behind FELA, damages should have been apportioned among the different sources of exposure, with the railroad liable only for the portion of the damages caused by its negligence. However, the court below refused to permit the jury to consider apportionment, rendering the railroad responsible not only for the damages allegedly caused by exposure during railroad employment, but also for the damages caused by the many years of exposure from other sources. Holding railroads liable for damages they did not cause is contrary to FELA and common law.

Notwithstanding the relaxed standard of causation established in *Rogers*, there is no basis in FELA for imposing liability on a railroad for damages it did not cause. Misinterpretation of the *Rogers* holding [12] has led to inconsistent

[12] *See e.g., Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993)(holding that under *Rogers*, "other causes do not affect the recovery against the employer."). An even more egregious example of the misapplication of *Rogers* is the distortion of the principle of ordinary negligence. *E.g., Kelson v. Cent. of Georgia R.R.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (holding the railroad owes a duty of "great care" to its employees).

rulings on the question of FELA apportionment. This court should enunciate a clear rule permitting FELA defendants to submit, and juries to consider, all relevant evidence of the cause or causes of plaintiff's injury or condition, and requiring juries reasonably to apportion damages between those caused by the railroad's negligence and those not caused by the railroad's negligence.

A. The common law on which FELA is based requires apportionment of damages between those caused by the negligence or fault of a party and those caused by other factors.

The policy underlying apportionment is that no party should be liable for harm it did not cause. Restatement (3d) of Torts: Apportionment of Liability, Topic 5 at 321 (1999). ["Restatement (3d)"]; *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2nd Cir. 1993). This Court was no doubt aware of this common law principle, and gave no indication that it should be altered, when it held in *Rogers*, that in FELA cases, the employer is liable for those damages due "in whole or in part to its negligence". *Id.* at 507.

FELA is to be interpreted in accordance with common law principles, except where the common law has been modified by Congress. *Gottshall*, 512 U.S. at 543-44. Where an issue is not addressed by express statutory language, courts are to look toward "developing legal principles." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 570 (1987), with due consideration being given to the common law principles prevailing at the time of FELA's enactment.[13] The common

[13] *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1989) (prejudgment interest not available under FELA as it was generally not available at common law when FELA was enacted). At the time FELA was enacted, damages, if they were to be awarded at all, were to be apportioned among the varying causes of a harm. See Petitioner's Brief, Part II.B.

law sanctions apportionment of damages among multiple causes when there is a reasonable basis for determining the contribution of each cause to a single harm. Restatement (3d); *See also* W. Page Keeton, *et al.*, Prosser & Keeton on the Law of Torts, § 52 (5th ed. 1984). Once it is determined that the defendant's conduct has been the cause of injury sustained by the plaintiff, a further question may arise as to the portion of the total damages which may be properly assigned to the defendant. *Id.* at 345-46.

B. Apportioning damages in FELA cases is consistent with the intent and purpose of FELA.

At first blush, the question of whether FELA damages may be apportioned among those causes attributable to railroad negligence and those attributable to other causes, unrelated to the railroad's conduct, brings into conflict two principles that guide FELA: on the one hand, FELA has been interpreted as a broad remedial statute, to be liberally construed in favor of recovery;[14] on the other hand, the words of the statute expressly limit rail carrier liability only to "a person suffering injury *while he is employed by [a] carrier . . .*" 45 U.S.C. §51 [emphasis added]. However, careful review of the statute and its underlying policy demonstrates that no such conflict exists. In fact, the construction given FELA by this Court militates in favor of permitting apportionment of damages in all cases where there is a reasonable basis in the evidence to do so.

FELA was enacted at a time when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[15] Moreover, the common law of negligence had

[14] *E.g., Hane v. National R.R. Passenger Corp.*, 110 F.3d 573, 574 (8th Cir. 1997); *Green v. River Term. Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985).

[15] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States* 1908, pp. 41, 99 (1909). Today,

erected a number of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[16]

Against this backdrop, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908,[17] to address the perils posed by railroad employment and to provide a remedy to employees who suffered injury or death as a result of that employment. *Gottshall*, 512 U.S. at 542 (the primary focus of Congress when enacting FELA was "injuries and death resulting from accidents on interstate railroads.") *See also Tiller v. Atlantic Coast Line*, 318 U.S. 54, 58 (1943); *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

The fundamental policy embodied in FELA was premised on the common law principle that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment caused by the negligence of the railroad. To ameliorate some of the harsh results which were a consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery.[18] It is indisputable that Congress envisioned

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the rail industry's safety record is immensely better. *See Federal Railroad Administration, Railroad Safety Statistics, Annual Report 2000.* (July 2001) (In 2000, there were 24 deaths and 8,423 injuries. p. 47 tbl. 4-2).

[16] Any contributory negligence by the plaintiff usually barred recovery. *E.g., Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). Recovery also was denied if the workers knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

[17] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

[18] The defenses of contributory negligence, assumption of the risk and the fellow servant doctrine were all eliminated by FELA. 45 U.S.C. §53; 45 U.S.C. §54; *see also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).

that the remedy available under FELA would be consistent with the common law concept of negligence, a principle that has consistently been recognized by this Court.[19]

In addition to the express changes to the common law made by Congress in enacting or amending FELA, *see supra* note 18, this Court has determined that FELA made an additional significant modification to the common law, holding that "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S. at 542 (citing *Rogers*); *see also Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2nd Cir. 1996). Lower courts have seized on the *Rogers* ruling to permit questions of causation to go to a jury on scant evidence and to permit juries to engage in inferences and speculation to support a finding of liability that would not be permitted in negligence cases arising under other laws. *E.g., Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697 (3d Cir. 1970); *see also Marchica v. Long Island R.R.*, 31 F.3d 1197, 1207 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995).

The causation standard grafted onto FELA permits juries to award damages against a railroad where the proof would not sustain such a finding in a traditional common law negligence suit. As interpreted by this Court, the "in whole or in part" language of §51 serves a "gatekeeper" function: if the employer's negligence can be shown to have played some role in producing the injury, the jury may find a railroad liable to the plaintiff. However, this is a separate and distinct question from determining the portion of the total damages for which the railroad may be liable. In considering that question, the jury

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[19] In *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916), this Court observed that the rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery." *See also Buckley*, 521 U.S. at 429 (FELA "liability rests on 'negligence'" quoting *Gottshall*, 512 U.S. at 543).

must be given an opportunity to consider other causes of the employee's injury so that they award no greater damages against a railroad than are warranted by the railroad's negligent conduct. There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

Apportionment of damages in FELA cases is required by both the common law and the statutory mandate that liability is imposed for injuries "suffer[ed] while employed by [a railroad] carrier." FELA was never meant to guarantee that injured rail workers would always be made whole irrespective of the cause or causes of their injuries or that railroad employers were to be the "insurer" of their employees' health and safety. *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947).

C. Although the common law principle of apportionment is recognized in many FELA cases, it is rejected by other courts, such as the court below, leading to harsh and inequitable results.

In FELA cases, damages must be apportioned in accordance with the proportionate share of negligence of the railroad employee and the employer. 45 U.S.C. §53.[20] Although the employee's negligence does not bar a claim, if that negligence results, in whole or in part, in the employee's injury or death, it must be compared with the negligence of the employer, and a percentage of fault must be apportioned to the employee.[21]

[20] However, proof of violation of certain safety statutes or regulations establishes negligence on the part of the railroad employer and also precludes any reduction of damages due to the employee's comparative negligence. 45 U.S.C. §53.

[21] If plaintiff's negligence is the sole cause of injury, the defendant has no liability under FELA. *Grand Trunk Ry. Co. v. Lindsay*, 233 U.S. 42, 47 (1914); *Wise v. Union Pac. R.R.*, 815 F.2d 55 (8th Cir. 1987); *Chicago, St. P., M. & O. R.R. v. Arnold*, 160 F.2d 1002 (8th Cir. 1947).

Seaboard Air Line v. Tilghman, 237 U.S. 499 (1915). The percent of negligence apportioned to the employee diminishes the employee's damages proportionally.[22]

Similarly, juries in FELA cases are routinely instructed that railroad employers are not liable for damages attributable to preexisting injuries or conditions, or subsequent injuries or conditions unrelated to the railroad's negligence. *Sauer v. Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996); *Stevens v. Bangor and Aroostook R.R.*, 97 F. 3d 594, 596 (1st Cir. 1996); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 564-65 (7th Cir. 1990) (en banc); *Harris v. Norfolk Southern*, 319 F.2d 493, 496 (4th Cir. 1963), *cert denied*, 375 U.S. 985 (1964). Moreover, causes of injury or damage unrelated to the incident made the basis of the FELA claim have been recognized as a basis for apportioning damages, either as caused by the negligence of the employee or as an independent cause of the employee's injury or damages. *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058 (8th Cir.) *cert. denied*, 506 U.S. 999 (1992); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986); *Harris v. Illinois Cent. R.R.* 58 F.3d 1140 (6th Cir. 1995); *Dale v. Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989).

Many courts have properly permitted the jury to apportion the damages between the railroad's negligence and other conduct or conditions causing or contributing to cause the

[22] If other defendants settle prior to verdict, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) requires that the settling parties' liability be apportioned so that the non-settling parties are only liable for their proportionate share of damages. *See Great Lakes Dredge & Dock v. Robert Walt Miller*, 92 F.3d 1102 (11th Cir. 1996) applying the *McDermott* rule in a Jones Act case. The court below did not apply the rule in *McDermott*, but instead gave defendant an offset for 75% of the prior settlements on a "dollar for dollar" basis rather than proportionate share basis as required by *McDermott*.

plaintiff's injury. The Tenth Circuit underscored this principle in *Sauer*, reasoning that:

> Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited. . . . Apportionment can be proved without expert testimony stating the percentage of injury attributable to the different causes.

In *Sauer*, given the pre-existing condition from which the plaintiff suffered, the jury was instructed to "reduce the damages by the likelihood that [plaintiff] would eventually have suffered the injury even if the accident had not occurred." *Id.* at 1495. The jury apportioned seventy-five percent of plaintiff's injuries to pre-existing conditions and prior accidents to reduce plaintiff's damages. Permitting such a reduction effectuates FELA's intent that the employer is only liable for the injury or damage caused by its negligence. *See Shupe v. N.Y. Cent. Sys.*, 339 F.2d 998, 1000 (7th Cir.), *cert. denied,* 381 U.S. 937 (1965).[23]

In *Dale* there was evidence that the plaintiff's lung condition was caused by a pre-existing lung disease. *Id.* at 1038. Recognizing that the prior disease was not attributable to the railroad's conduct, the Supreme Court of Pennsylvania ruled that the jury should have been instructed to apportion damages between the prior condition and any damage caused by exposure to asbestos while an employee of defendant. *Id.* at 1041.

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[23] Similarly, in *Taylor*, the Ninth Circuit held that because plaintiff had physical disabilities, and used drugs, the defendant was entitled to an instruction requiring the jury to consider "the independent- causes of Taylor's mental illness" in "order to reduce [defendant's] liability." 787 F.2d at 1314. In *Varhol*, the Seventh Circuit held that where plaintiff had a pre-existing condition, the trial court properly instructed the jury "to determine what portion of [plaintiff's] condition . . . resulted from the derailment" and award damages only for the aggravation. 909 F.2d at 1564.

> [W]e hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id.

The Seventh Circuit took a similar position in *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987). In *Lancaster*, there was evidence that the defendant's tortious conduct contributed to the plaintiff's schizophrenia. *Id.* at 811. There was also evidence that the schizophrenia would have been set off by other events later in plaintiff's life. *Id.* Although the court did not reverse, it stated that the jury should have been given a specific instruction regarding apportionment of damages between the various causes. *Id.* at 823.[24]

Juries are well suited to make decisions regarding apportionment, and expert testimony precisely apportioning the injury on a percentage basis is not required to apportion damages between various causes. *Lancaster*, 773 F.2d at 823; *see also Sauer*, 106 F.3d at 1494:

> When there is evidence that defendant's negligence aggravated a pre-existing condition but expert testimony does not precisely apportion the injury, apportionment is an issue for the jury.[25]

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[24] *See also Akers v. Norfolk & W. Ry. Co.*, 417 F.2d 632 (4th Cir. 1969) (railroad not responsible for damages for condition existing prior to work-related injury); *Kichline v. Consol. Rail Corp.*, 800 F.2d 356, 361 (3rd Cir. 1986)(jury must apportion the extent of aggravation of the injury between time period barred by statute of limitations and period not barred by statute of limitations, with the damages award limited only for the latter period).

[25] Other courts, however, have refused to permit apportionment of damages, clinging to the erroneous notion that Congress intended to hold

The court below essentially instructed the jury that FELA mandates that an employer is responsible for compensating its employees for damages it did not cause. Following this instruction, the jury returned verdicts for the plaintiffs averaging nearly $1 million each. In addition to erroneously instructing the jury that it could not consider the fact that other exposures may have caused a portion of the plaintiffs' damages, the court suggested that it would make any appropriate deductions, leaving the jury with the belief that its award would be reduced for those exposures. The effect of the ruling below is to sweep within the confines of FELA every harm or wrong suffered by a rail employee at any time in his or her life, from any cause, so long as minimal evidence of railroad negligence can be connected to the harm suffered. This does not reflect the intent of FELA; moreover, "[t]his is not equity, . . . but a windfall." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 280 (Blackmun, J. dissenting), *cert. denied,* 449 U.S. 889 (1979).

Where a defendant's liability is not based on traditional notions of causation, the harsh results which may obtain should be ameliorated by a rule permitting apportionment of damages where there is a reasonable basis for doing so. Outside the context of FELA, courts have recognized this principle. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, imposes liability for clean-up costs on generators of hazardous substances without the need to show that the defendant's conduct proximately caused the damages, 42 U.S.C. § 9607; *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252,

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railroads liable for all damages suffered by employees notwithstanding that they arose from causes independent of the railroad employment. *E.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1134 (5th Cir. 1995); *Lockard v. Missouri Pac. R.R.* 894 F.2d 299, 305 (8th Cir. 1990); *Gaulden v. Burlington Northern , Inc.*, 654 P.2d 383, 391 (Kan. 1982).

264 (3d Cir. 1992).[26] In *Alcan*, the Third Circuit acknowledged the potential for "unfair imposition of liability" under CERCLA, *id.* at 267, and, relying on the Restatement, held that the defendant must have an opportunity to present evidence to show that the harm for which damages are sought is capable of apportionment among multiple causes and, "if [the defendant] succeeds in this endeavor, it should only be liable for that portion for the harm fairly attributable to it." *Id.* at 269.

Similarly, in *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993), the court held that the defendant must be permitted to introduce evidence on apportionment of damages if there is a reasonable basis for doing so:

> Essentially, the question whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant. If the expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances. The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.

Id. at 903.

In *Bell*, the court found that pollution of a stream by two or more factories may be treated as divisible in terms of degree, and apportioned among defendants on the basis of evidence of

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[26] Like FELA, CERCLA does not contain an express provision on how damages are to be allocated. CERCLA has been interpreted as requiring courts to determine, in accordance with traditional common law principles, whether joint and several, or some other allocation of liability is appropriate. *Alcan*, 964 F.2d at 268.

the respective quantities of pollution discharged by each. *Id.* Similarly, as in this case, where the plaintiff has allegedly been exposed to a hazardous substance by two or more sources, the railroad defendant must be permitted to present evidence on the comparative level of exposure from each source, or evidence establishing some other reasonable basis for apportionment.

The notion that courts have an obligation to assess damages based on the extent to which a defendant's culpable conduct contributed to the harm has gained favor in American jurisprudence. Eschewing traditional damages rules that result in unfair outcomes, in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), an admiralty case, this Court abrogated the long-standing rule which divided damages equally whenever two or more parties were found to be guilty of contributory negligence regardless of their relative degree of fault. This Court found that in most cases, the prevailing rule "produces palpably unfair results" *id.* at 405, and that the goal of a "'just' and 'equitable' allocation of damages . . . can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 411.

Establishing a rule consistent with FELA's intent that railroads are responsible only for damages attributable to their negligence and not for damages attributable to other causes is increasingly important given the trends in FELA litigation. A significant portion of FELA suits now allege long-term exposure to harmful substances [27] or conditions (in some case, conditions that are consistent with the normal aging process).[28] Often, as in the case below, the condition alleged is caused

[27] *See e.g., Baker v. Norfolk & W. Ry.*, 514 S.E. 2d 448 (Ga. App. 1999)(alleging exposure to diesel exhaust caused cancer).

[28] Thousands of FELA cases have been filed over the past fifteen years alleging hearing loss, a condition that also often accompanies the aging process.

or contributed to by factors that are not related to the railroad workplace.

The perils of railroad work do not include the perils of being exposed to harmful substances at other jobs, the health risks of smoking, or of dangerous hobbies.[29] To assure that FELA does not become a health and welfare insurance policy for rail workers—something it was never meant to be—where there are causes other than the railroad's negligence responsible for the employee's injury a jury must be permitted to apportion the damages between the railroad's negligence and the other cause(s), where there is a reasonable basis for doing so.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below.

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[29] *See Paul; Zarrow-Smith v. New Jersey Transit Rail Operations*, 953 F.Supp. 581 (D.N.J. 1997); *Taylor*.

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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, ET AL.,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICI CURIAE* OF THE COALITION FOR ASBESTOS JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

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Susan Warren, *Asbestos Suits Target Makers Of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1 ..... .16

IN THE

Supreme Court of the United States

No. 01-963

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, ET AL.,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICI CURIAE* OF THE COALITION FOR ASBESTOS JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] In important cases that may have a significant impact on the asbestos litigation environment, the Coalition files *amicus curiae* briefs before state courts of last resort and the United States Supreme Court.

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength. The NAM's membership includes virtually all classes of defendants in all industrial sectors.

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[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues.

The American Chemistry Council ("Council") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial matters affecting the United States petroleum industry.

SUMMARY OF ARGUMENT

This country is in the midst of "an asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The courts themselves are partly to blame. "The

judiciary has been handling the asbestos litigation for a generation, and its management of the litigation has contributed to what is now called a crisis but may better deserve to be termed a disaster." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School) [hereinafter "Eskridge Testimony"].

The courts have undoubtedly acted with the best of intentions. But individual courts are poorly situated to deal with a national problem of this scope and complexity, and their rulings, taken together, have only aggravated the situation. Courts that have abandoned traditional procedural protections and substantive limits on recovery have generated a flood of new claims, mostly by unimpaired or mildly impaired plaintiffs. Payments to those claimants have encouraged still more filings at the same time that they have forced scores of companies into bankruptcy. Those bankruptcies, in turn, have put mounting pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out defendants with ever more attenuated connections to asbestos. Now those companies themselves are beginning to collapse, in a "domino effect" that could play out on a broad scale for many years to come.

Within this context, the instant case exemplifies the nationwide asbestos-litigation crisis. It involves a group of plaintiffs who are, at best, mildly impaired, suing a defendant with a connection to asbestos that is, at best, attenuated, seeking to recover damages on a bare claim of emotional distress. And the case arises in a state that has developed a reputation for subordinating the procedural rights of defendants in a misguided effort to promote the "efficient" handling of asbestos claims.

This brief focuses on the second issue presented to the Court: whether defendants under the Federal Employers' Liability Act ("FELA") may be held 100 percent liable for damages even where they are only minimally to blame. The West Virginia courts' imposition of joint liability under FELA is contrary both to the statute, evolving common law principles, and sound public policy. Like the lower court's ruling with respect to recovery for emotional distress, the lower court's ruling on apportionment, if left undisturbed, will only accelerate the most damaging trends of the current crisis.

ARGUMENT

I. RULINGS LIKE THE ONES AT ISSUE HERE ARE CONTRIBUTING TO AN ACKNOWLEDGED "ASBESTOS-LITIGATION CRISIS."

A. The Crisis.

When asbestos product liability lawsuits emerged almost thirty years ago,[3] nobody could have predicted that courts today would be facing what this Court has aptly termed an "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Occupational Safety and Health Administration ("OSHA") promulgated its first asbestos regulation in 1971, and followed up with increasingly stringent regulations in the years to follow.[4] By the early 1970s, "use of new asbestos essentially ceased in

[3] *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

[4] OSHA was created in 1970 and almost immediately promulgated an initial regulation limiting exposure to asbestos. *See* 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit exposure still further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971); 37 Fed. Reg. 11318 (June 7, 1972). OSHA's asbestos regulations became progressively more restrictive until they effectively precluded the use of asbestos in most commercial applications.

1970s, "use of new asbestos essentially ceased in the United States." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991) (Weinstein, J.), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reviewing history of asbestos use). Therefore, many believed that asbestos litigation would be a serious but diminishing problem. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000) [hereinafter "Schwartz & Lorber"].

The opposite is true. Instead of declining, asbestos filings are multiplying exponentially. In 1991, approximately 100,000 asbestos cases were pending in courts around the country. By 1999, that number had doubled to roughly 200,000. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) [hereinafter "Edley House Testimony"]. New cases are now filed at a rate greater than ever before. In 2001 alone, plaintiffs filed at least 90,000 new claims. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 [hereinafter "Berenson"]. Up to 700,000 more cases are expected by the year 2050. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999). All told, the number of future claimants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991) [hereinafter "Judicial Conference Report"].

In short, "the asbestos litigation crisis not only remains with us, but has in important respects grown worse." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on S. 758, Before the Senate Judiciary Comm.*, 106th Cong. at 1 (Oct. 5, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School); Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9.

In 1991, the Judicial Conference described a looming "disaster of major proportions." Judicial Conference Report at 2. Since that time, the rate of new filings and the mounting number of pending cases have only exacerbated the crisis. Long delays in resolving claims remain routine. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 394 (1993)) [hereinafter "Edley & Weiler"]. Bankruptcies increasingly threaten the ability of asbestos defendants to compensate seriously ill plaintiffs, now and in the future. Transactional costs "consume more and more of a relatively static amount of money to pay [] claims." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring). The total cost to the economy is staggering.[5]

B. The Courts' Contribution to the Crisis.

The origins of the wave of asbestos litigation that began in the 1970s are well known. In the 1940s and 1950s, mil-

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[5] Ratings agency A.M. Best estimates that asbestos litigation already has cost American companies over $21.6 billion, and may cost another $43.4 billion over the next 20 years. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. At least one consulting firm has put the total future cost of the litigation at $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html.

lions of American workers were exposed to asbestos, usually with few or no precautions. Resulting illnesses began to appear by the 1960s, and, because some asbestos-related diseases have latency periods of up to 40 years, injuries continued to emerge in later decades. Recent estimates suggest that hundreds of thousands of Americans were injured by exposure to asbestos and that thousands have died or will die as a result. *See* Edley & Weiler at 388-89. Absent congressional action – and, despite pleas from this Court, other courts, and the Judicial Conference, none has been forthcoming[6] – it was inevitable that asbestos litigation would present a major problem for the courts.

What is harder to understand is why a problem that should have begun to resolve itself by now has instead worsened dramatically. It is here that the courts themselves share some of the blame. With the best of intentions, many courts have adopted both procedural and substantive rules intended to facilitate resolution of asbestos claims – to put money in the hands of the sick as quickly as possible, and also to clear court dockets of overwhelming numbers of cases. Those efforts have been massively counterproductive. Lowering the legal barriers to recovery may seem attractive in individual cases, but in the aggregate, it only fuels the fire, inviting

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[6] *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); *State ex rel. Mobil Corp. v. Gaughan*, No. 30314, 2002 WL 745965, at *5 (W. Va. Apr. 25, 2002); *State ex rel. Appalachian Power Co. v. MacQueen, III*, 479 So. 2d 300, 304 (W. Va. 1996); Judicial Conference Report at 3 ("The Committee firmly believes that the ultimate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

more and more claims with little regard for merit. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

1. *Procedural Shortcuts.* Faced with hundreds or even thousands of asbestos claims on their dockets, courts have struggled to find ways of speeding final decision or settlement. One "near-heroic effort[] . . . to make the best of a bad situation," *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring), involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Court in *Amchem* and *Ortiz*: even the most pressing efficiency interests, the Court held, cannot justify the lumping together of disparate and fact specific claims for settlement purposes. *See Amchem*, 521 U.S. at 620-29; *Ortiz*, 527 U.S. at 841-61.

Other courts – including those in West Virginia – have turned to mass joinders and "jumbo" consolidations, aggregating thousands of claims against dozens or hundreds of defendants in an effort to produce quick settlements with low transaction costs. *See* Eskridge Testimony at 13 (describing pressure on defendants to settle on terms favorable to plaintiffs). Typically, the claims are so disparate – injured plaintiffs joined with the unimpaired, plaintiffs exposed to asbestos in different settings and even in different decades – that they would not remotely qualify for aggregation under normal circumstances. *See* Schwartz & Lorber at 256-57 ("In other cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries."). In the asbestos context, however, courts see no choice but to forgo standard procedural protections in an effort to streamline resolution of claims.

Even if this trade-off were acceptable – and *Amchem* and *Ortiz* suggest strongly that it is not – it has proven en-

tirely counterproductive. As it turns out, bending procedural rules to put pressure on defendants to settle, *see* Eskridge Testimony at 39-40, brings no lasting efficiency gains. Rather than making cases go away, it invites new ones. As Professor Eskridge explains, "[J]udicial experimentation has sacrificed both [procedural protections] and efficiency, by helping create a juggernaut whereby jumbo settlements generate more lawsuits." *Id.*; *see also* Schwartz & Lorber at 249. This effect should not be surprising:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).[7]

West Virginia is a case in point. The West Virginia courts believe that they have no choice but to "adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation." *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996). In practice, this has meant two mass asbestos trials, with a third scheduled for this fall. But this judicial "innovation" – the consolidation of tens of thousands

[7] *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger mass tort filings become."); Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

of disparate claims regardless of the risk of prejudice or judicial confusion – has not solved West Virginia's asbestos problem. Instead, it has aggravated it, by encouraging both in- and out-of-state potential plaintiffs to take advantage of West Virginia's plaintiff-friendly procedural regime. As one West Virginia trial judge involved in asbestos litigation has ruefully acknowledged:

> I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.

In re Asbestos Litig., Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (transcript of hearing before Judge John A. Hutchinson). In short, gross procedural shortcuts have not only failed to solve the asbestos-litigation crisis; they have themselves become part of the problem.

2. *Unimpaired or Mildly Impaired Plaintiffs.* The courts' substantive rulings in asbestos cases also have contributed to the litigation crisis. Of special concern are substantive rules – like the one below – that make it easier for unimpaired or only mildly impaired plaintiffs to recover. It is by now widely acknowledged that claims by the relatively unimpaired are at the heart of the continuing asbestos-litigation crisis. *See* Mark Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).

Some unimpaired plaintiffs, though they have been exposed to asbestos, show no physical symptoms at all. Others show "pleural plaques" or "pleural thickening," physical

changes in the lungs that do not affect lung functions and do not necessarily lead to or increase the risk of asbestos-related disease. Mild forms of asbestosis, a set of lung disorders, also may be present without significant impairment or any medical link to more severe illnesses, such as cancer. What all of these unimpaired or less-impaired plaintiffs have in common is that they do not suffer from the kinds of asbestos-related cancers – most often, mesothelioma – or severe asbestosis prevalent in asbestos plaintiffs of earlier decades. *See* Edley & Weiler at 393; Eskridge Testimony at 8.

In *Amchem*, 521 U.S. at 629, Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number may be conservative. For instance, Professor Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing. *See* Edley House Testimony at 5. Some current estimates are as high as 90 percent. *See* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001). Whatever the precise percentage, mass filings by unimpaired or mildly impaired claimants are the "wild card" that caused earlier predictions of a decline in litigation to be so far off the mark.

The problem presented by these claims is self-evident: they divert scarce resources from the truly ill claimants who need them most. Backlogs of claims by the unimpaired or mildly impaired slow the judicial process, delaying resolution for those with fatal diseases and elderly claimants. Payments to the unimpaired or mildly impaired are rapidly exhausting limited assets that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal

citation omitted).[8] Indeed, lawyers who represent asbestos plaintiffs with cancer share this concern, recognizing that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation. *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (Scruggs: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.").

Several factors help to explain this phenomenon. Some plaintiffs exposed to asbestos may feel compelled to file suit despite the absence of symptoms for "fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability." *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. 1991); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong., at 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary, U.S. Department of Health and Human Services). Other plaintiffs, aware that many asbestos defendants are filing for bankruptcy, may seek compensation now because they worry that it will not be available later.

Again, however, the courts' own rulings in asbestos cases contribute to the problem. Rulings like the one below have on a systemic level opened the floodgates to claims by unimpaired or mildly impaired plaintiffs. Some courts have done this simply by recognizing as a compensable injury pleural thickening, visible only on an x-ray and harmless. *See* Edley

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[8] *See also* Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1; Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6.

House Testimony at 5. Others have allowed unimpaired claimants to sue for medical monitoring. In *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424 (1997), this Court refused to authorize an asbestos-related medical monitoring claim under FELA, recognizing that such a claim would extend to "tens of millions of individuals," expose defendants to unlimited liability, and thus drain the pool of resources available for meritorious claims by plaintiffs with serious present harm. *Id.* at 442. Nevertheless, a minority of states, including West Virginia, permit medical monitoring claims under state law. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).[9]

Finally, there are the claims based on fear of future injury that are at issue in this case. *See* James A. Henderson, Jr. & Aaron D.Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (forthcoming 2002) (lodged with Court). There is no question but that emotional injuries may be compensable under common law. The issue in this case is whether, as the West Virginia courts have held, asbestos plaintiffs should be freed under FELA of the general common law requirement that emotional injuries be manifested in some objective form. That requirement, as the Court explained in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994), is necessary to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." If the decision below is permitted to stand, it will invite a whole

[9] Two states that have more recently addressed medical monitoring have concurred in this Court's reasoning and rejected medical monitoring claims. *See Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001); *Hinton v. Monsanto Co.*, 2001 WL 1073699 (Ala. Sept. 14, 2001).

new generation of filings by unimpaired or mildly impaired plaintiffs.

Thus, substantive rulings regarding unimpaired or mildly impaired plaintiffs have, like procedural shortcuts, become a part of the very problem they are designed to address. However well-intentioned, they inevitably encourage plaintiffs to sue even in the absence of any serious injury, and encourage aggressive lawyers to seek out new clients.[10] The upshot, of course, is that judicial resources and defendant assets are diverted from the truly sick claimants who need them most.[11]

3. *Peripheral Defendants.* A final development for which the courts must accept some responsibility is the degree to which asbestos litigation has come to focus on defendants whose involvement is peripheral, at best. The first step in this direction came in the 1980s and 1990s, as asbestos claimants and their lawyers turned their attention from asbestos producers to large companies who had purchased those businesses in the 1960s and 1970s – well after the conduct giving rise to liability had occurred and then ceased. *See* Edley House Testimony at 8.

At one step further removed are the defendants being sued today: defendants, like the railroads in this case, with

[10] *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 748 (describing lawyers who have "arranged through the use of medical trailers . . . to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaques"); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 (lawyers advertise with solicitations reading: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

[11] *See* Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154.

only the most attenuated connection to the original wrongdoing that gave rise to the asbestos-litigation crisis. These defendants are involved solely by virtue of the fact that they used products that contained some form of asbestos, or have asbestos on their premises. *See* Schwartz & Lorber at 262-63; *see also* Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22.

The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation. In the early to mid-1980s, before this latest development, approximately 300 defendants had been named in asbestos cases. *See* James S. Kakalik *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* vii (RAND Inst. for Civil Justice 1984). Today, that number stands in the thousands. *See* Douglas McLeod, *Asbestos Continues to Bite Industry*, Bus. Ins., Jan. 8, 2001, at 1. And it includes such household names as Ford Motor Co., Campbell Soup Co., AT&T Corp., AT&T Corp., and 3M Co., the maker of Scotch™ tape and Post-it™ notes, *see* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1 – none of which could be described as "asbestos companies" and none of which had any part in the making and marketing of asbestos that gave rise to today's claims. *See* Schwartz & Lorber at 263-64. As one attorney involved in the litigation has stated, "Asbestos litigation has turned into a search for the [next] solvent bystander." Berenson at A1 (quoting W.R. Grace counsel David Bernick). *See also* Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

One of the explanations for this phenomenon is obvious. Most of the early targets of asbestos litigation – the producers and suppliers of asbestos in the 1940s and 1950s – paid billions of dollars in damages and then declared bankruptcy. Plaintiffs and their lawyers were forced to expand their "search for deep pockets" – first to corporate successors of the original defendants, and then, as those companies began to experience their own financial difficulties, to today's outer ring of peripheral defendants. *See* Edley & Weiler at 384, 394-95; *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48 (a "newer generation of peripheral defendants are becoming ensnarled in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries" even where extent of liability is unknown); Michael Freedman, *The Tort Mess*, Forbes, May 13, 2002, at 95.

To date, more than 57 companies have been driven into bankruptcy. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12. In the last two years this process has accelerated dramatically, forcing at least 18 companies with more than 100,000 employees into bankruptcy. *See* Berenson at A1.[12] More companies will follow, probably by the end of this year. *See* Deborah Hensler *et al.*, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 50 (RAND Inst. for Civil Justice, 2001) (preliminary report) (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months."). Each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, whose resources are limited, *see* Edley & Weiler at 392, and

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[12] Employers that have recently declared bankruptcy include Owens Corning, Babcock & Wilcox Co., Pittsburgh Corning Corp., Armstrong World Industries, Inc., Federal-Mogul Corp., USG Corp., W.R. Grace & Co., G-I Holdings, Inc. (formerly known as GAF Corp.), Kaiser Aluminum Corp., Porter-Hayden Co., A.P. Green Industries, Inc., Harbison-Walker Refractories Co., Shook & Fletcher Insulation Co., and North American Refractories Company.

removes one more source of funds from the pool available to asbestos claimants. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001.

To the considerable extent that their rulings in asbestos cases have contributed to these bankruptcies, the courts themselves are indirectly responsible for the search for peripheral defendants that follows. Some courts have aggravated the problem more directly, through rulings that – like the one below – impose a strict form of joint and several liability on asbestos defendants. One of the things that makes a suit against a peripheral defendant attractive is that under a regime of joint and several liability, a plaintiff may recover *all* of his damages from such a defendant, even if the defendant is only very marginally responsible and other defendants (like original asbestos producers) deserve vastly more of the blame. Joint and several liability also makes suits against peripheral defendants more devastating. Some of the new class of attenuated defendants already are beginning to collapse under the weight of the claims against them. *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike in Claims*, Vol. 15, No. 23 Mealey's Asbestos Rptr., Jan. 5, 2001. Joint and several liability can only accelerate this process, further threatening the ability of asbestos claimants to recover for their injuries.

* * *

The courts' best efforts to address the asbestos-litigation problem have backfired, and helped to turn a problem into a crisis. Procedural shortcuts dispose of cases only to have them replicated two-fold. Short-sighted substantive rules help to assure that an ever-increasing proportion of claims are filed by the least impaired against the least responsible, while other defendants are forced into bankruptcy and plaintiffs with greater needs are left with fewer resources for compensation. As this Court has recognized already, the only real solution to the problem is national legislation. *See Amchem*, 521 U.S. at 628-29; *Ortiz*, 527 U.S. at 821; *id.* at 865 (Rehnquist, C.J., concurring). *See also* Michael E. Baroody, Editorial, *Litigation by Healthy Hurting Real Asbestos Victims*, Houston Chron., May 16, 2002, at 33A. Such legislation, however, can come only from a *legislature*, not from courts "stepping up" to legislate away traditional procedural and substantive rights. Until such legislation is enacted, this Court should insist that the lower courts return to sound rules of procedure and substance – rules that move valid cases properly through the court, apportion responsibility fairly among defendants, and preserve limited resources for the claimants most in need. *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph).

II. LIABILITY SHOULD BE APPORTIONED FAIRLY UNDER FELA.

The court below instructed the jury that if it found the railroad defendant liable in the slightest degree for respondents' asbestos-related injuries, it should hold the defendant responsible for 100 percent of the respondents' damages. Under the West Virginia ruling, that would be true even if a respondent's injuries were caused in greater part by some entirely independent exposure to asbestos, such as more lengthy employment with another employer. The West Virginia rule would also make the railroad fully liable for injuries that, while in some small part railroad-related, could be traced principally to other parties like asbestos manufacturers and suppliers.

The court based its instructions on the traditional doctrine of joint liability, commonly called joint and several liability. That doctrine – followed in West Virginia and a small minority of the states – provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages rather than a share based on comparative responsibility. *See Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983). This Court should decline to incorporate the doctrine of joint liability into FELA. That kind of full joint liability is contrary to evolving common law principles and entirely inconsistent with FELA's comparative negligence regime. In the asbestos context, it is also very bad public policy, contributing to the spiral of bankruptcies and the litigation's recent spread to peripheral defendants.

A. Evolving Common Law Principles Support Proportionate, Not Joint, Liability.

In construing FELA, the Court relies significantly on common law principles. Where those principles are "not expressly rejected in the text of the statute, they are entitled to great weight in [the Court's] analysis." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994); *see also id.* at 558 (Court is to "develop a federal common law of negligence under FELA, informed by reference to the evolving common law"); *Metro-North Commuter R.R. Co.*, 521 U.S. at 429 (quoting *Gottshall*). The relevant text in this case can hardly be said to "expressly reject[]" common law principles calling for apportionment of liability; if anything, it suggests an intent to provide compensation only when an employee is injured by the fault of his employer, and not by off-the-job causes. *See* 45 U.S.C. § 51 (railroad carrier "shall be liable in damages to any person suffering injury *while he is employed by such carrier*") (emphasis added). Accordingly, common law principles carry substantial weight in this case.

Over the past several decades, the shortcomings of joint liability rules have become increasingly apparent. Most obviously, joint liability is unfair: in many of its operations, it means that a defendant only minimally at fault bears a disproportionate burden. Joint liability is also inefficient. Negligent actors who know that other defendants may bear the full costs of their behavior are encouraged to under-insure and discouraged from adopting safety measures. Conversely, by vastly increasing the exposure of defendants who are only marginally at fault, joint liability may encourage risk-averse behavior that is socially unproductive.[13]

Recognizing the harms that may flow from application of full joint liability, a substantial majority of states – thirty-five of fifty – have abolished or modified the traditional doctrine. *See* Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a (2000) (surveying state joint liability laws) [hereinafter "Restatement"]; *see also* Victor E. Schwartz, *Comparative Negligence* app. b (3d ed. 1994 & Supp. 1999) [hereinafter "Schwartz"].[14] As the Restatement explains,

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[13] For instance, joint liability has contributed to the decisions of manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or refrain from introducing new products. Joint liability also contributed to a serious public health crisis that threatened the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. Companies ceased supplying raw materials and component parts to medical implant manufacturers because, under a joint liability regime, they found that the potential costs of litigation far exceeded potential sales revenues. The crisis was resolved only by congressional legislation, the Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601 to 1606 (2001). *See generally* Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 Tex. Rev. L. & Pol. 261, 297 (2000).

[14] Several liability is also supported by federal law in labor cases, *see Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967), and Comprehensive Environmental Response, Compensation, and Liability Act cases. *See United States v. Hercules, Inc.*, 247 F.3d 706, 717-18 (8th Cir.), *cert. denied sub*

"[t]he clear trend over the past several decades has been a move away from joint and several liability." Restatement § 17 Rptrs.' Note cmt. a.

As of 2000, fifteen states had entirely abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate share of fault for the harm. *See id.* Several states accomplished this reform through judicial decision. *See Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503 (Ky. 1985); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *cf. Anderson v. O'Donohue*, 677 P.2d 648 (Okla. 1983) (abolishing joint liability where plaintiff was at fault); *Washburn v. Beatt Equip. Co.*, 840 P.2d 860 (Wash. 1992) (same). Some states have generally eliminated joint liability, but carved out narrow exceptions in which joint liability is retained. *See, e.g.*, Idaho Code § 6-803 (Michie 2001) (exempting cases arising out of a violation of state or federal law related to hazardous waste or an action arising out of the manufacture of medical devices or pharmaceutical products); Mich. Comp. Laws §§ 600.6304(4), 600.6312 (2001) (exempting certain medical malpractice claims and criminal conduct involving gross negligence or the use of alcohol or drugs). About a dozen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level. *See, e.g.*, N.H. Rev. Stat. Ann. § 507:7-e (2001) (abolishing joint liability for defendants less than 50% at fault); Wisc. Stat. Ann. § 895.045(1) (West 2002) (abolishing joint liability for defendants found to be less than 51% at fault).

For present purposes, whether these numerous joint liability reforms were accomplished by way of judicial deci-

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nom. Crompton Co./Cie v. United States, 122 S. Ct. 665 (2001); *United States v. Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998).

sion or statute is unimportant. Statutory changes may alter the common law as surely as judicial decisions. This Court recognized the relationship between statutory reform and common law in *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which involved a claim for wrongful death under maritime law. The Court ruled that although maritime law had not historically permitted recovery for wrongful death, "the wholesale abandonment" of this rule through the adoption of state wrongful-death statutes altered the common law. *See id.* at 389-91. The Court explained:

> The statutes evidence a wide rejection by the legislatures of whatever justifications may have once existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

Id. at 391 (citing James M. Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213, 226-27 (1934)). "It has always been the duty of the common-law court," the Court continued, "to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherent body of common-law principles – many of them deriving from earlier legislative exertions." *Id.*

That leaves just a distinct minority of fifteen jurisdictions that have yet to abolish or modify their joint liability rules. *See* Restatement § 17 Rptrs.' Note cmt. a. West Virginia is among those states. But that fact does not justify the decision below. West Virginia courts hearing FELA actions are required to apply federal law, not their own state law. *See*

Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359, 361 (1952). There is no reason why FELA, which looks to prevailing common law principles for its content, should incorporate a rule that has been rejected by a large and growing majority of states.

B. Joint Liability is Inconsistent With FELA's Comparative Negligence Regime.

The contributory negligence doctrine prohibits a plaintiff who is negligent in any degree from recovering any portion of his damages, even from a defendant who bears more responsibility for the harm. That was the almost uniform rule in the United States – until 1908, when FELA was enacted. FELA expressly abrogated the common law contributory negligence rule, providing instead that even negligent plaintiffs may recover that portion of their damages attributable to their employers. *See* 45 U.S.C. § 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee"). FELA thus became a forerunner of a more general shift away from contributory negligence and toward comparative fault regimes.

It would be especially incongruous to import a joint liability rule for defendants into a statute that eliminates contributory negligence for plaintiffs. Joint liability and contributory negligence have their source in the same general theory: that parties may be responsible for *all* of the consequences of their actions. If a defendant's negligence causes an accident, then that defendant is liable for all of the resulting injuries, regardless of whether other defendants share the blame; and if a plaintiff's negligence contributes to an accident, then that plaintiff must bear the cost of the resulting injuries, regardless of whether others might also bear responsibility. Taken together, joint liability and contributory negligence at least have the virtue of consistency. *See, e.g., Teepak, Inc., v. Learned*, 699 P.2d 35, 39 (Kan. 1985) ("when the plaintiff had to be totally without negligence to recover . . . an argument could be made which justified [joint liability]").

The move from contributory negligence to comparative fault, however, eliminates one side of this rough equation. Comparative fault is grounded in a very different principle: that liability should be assessed in relation to fault, and apportioned fairly based on each party's individual responsibility. Once that principle is adopted with respect to plaintiffs – as it is in FELA's § 53 – it is difficult to justify imposition of joint liability, which allows for liability disproportionate to fault, on the other side of the ledger. *See* U.S. Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case For Reform*, 64 Denv. U.L. Rev. 651 (1988); 2 American Law Institute, *Enterprise Responsibility for Personal Injury -- Reporters' Study* 149 (1991).

Several states have relied on precisely this potential inconsistency in abandoning joint liability for rules that apportion liability more fairly among defendants. In *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992), for instance, the Tennessee Supreme Court held that joint and several liability became "obsolete" once the court adopted comparative negligence in place of the old contributory negligence rule. The court explained:

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would

> be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

Id. The Kentucky Supreme Court reached the same conclusion in *Dix & Assocs. Pipeline Contractors, Inc., v. Key*, 799 S.W.2d 24, 27-28 (1990), reasoning that the same "fundamental fairness" concerns that led it to replace the contributory negligence bar with a comparative fault rule also mandated elimination of joint and several liability. And in *Teepak, supra*, the Kansas Supreme Court put it this way:

> The legislature [in adopting comparative fault] intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them.

699 P.2d at 39 (internal quotation omitted); *see also Hurt v. Freeland*, 589 N.W.2d 551 (N.D. 1999) (to same effect).

The same reasoning, of course, applies to FELA. Congress, in adopting § 53, "intended to equate recovery and duty to pay to degree of fault." *Teepak*, 699 P.2d at 39. Under that principle, joint liability has no more place than contributory negligence. *See Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037, 1041-42 (Pa. 1989) (policy behind § 53 compels conclusion that joint liability is inapplicable under FELA).

C. Joint Liability is Inconsistent With Sound Public Policy.

As discussed briefly above, *see supra* Part I, application of full joint liability, under FELA as in other contexts, contributes significantly to the asbestos-litigation crisis. Joint liability leaves even the most peripheral asbestos defendants vulnerable to the same bankruptcies that inflicted their predecessor defendants, by vastly increasing potential exposure. Those bankruptcies – especially in combination with the flood of claims by unimpaired plaintiffs – increasingly threaten the ability of the neediest claimants to recover adequate compensation. *See* Amity Shlaes, *The Real-life Tragedy of the Asbestos Theatre*, Fin. Times, May 14, 2002, at 15. Adoption of proportionate liability as the rule under FELA, on the other hand, would help to slow the pace of asbestos-related bankruptcies and preserve assets for the truly sick.

Joint liability also encourages suits against the most peripheral asbestos defendants: so long as defendants only very marginally responsible for asbestos-related injuries may be held liable for full damages, they are inviting targets. But peripheral defendants like the railroad in this case – distributors and retailers of products containing asbestos and other employers who use those products – are almost by definition not 100 percent to blame for asbestos-related injuries. These defendants had no control over the actions of asbestos manufacturers that originally produced this crisis, and they had no specialized knowledge of the risks of asbestos exposure or the ways to combat those risks. It is fundamentally unfair to hold such defendants fully liable for injuries caused primarily by other, far more culpable actors.

Amici believe that the fairest resolution, and also the one most likely to assist in alleviating the asbestos-litigation crisis, is the adoption of pure several liability, or "fair share"

liability, in FELA cases. Under a several liability regime, peripheral defendants would be responsible only for the damages caused by their own negligence, and not for the misconduct of others. This approach has strong support in prevailing common law principles, having been adopted by at least 15 states, *see* Restatement, *supra*, and is the most consistent with FELA's comparative fault regime. The Court has ample basis for holding that pure several liability, rather than the pure joint liability imposed below, is the appropriate rule under FELA.

It should be noted, however, that while fair share liability is the soundest rule to adopt for FELA cases, it is not the only alternative open to this Court. Many states have taken something other than an "all or nothing" approach, modifying joint liability to more fairly apportion damages without abandoning it altogether. *See* Restatement, *supra*. Indeed, "[m]ore jurisdictions have some form of a hybrid system than have either pure joint and several or pure several-liability systems." *Id.* And any approach that allows for at least some degree of apportionment based on individual responsibility can be justified by reference to the same equitable principles that underlie § 53. In short, a "hybrid" approach might also be supportable under FELA.

One of the limited modifications to joint liability has become known as the "California approach," after a voter referendum approved in that state in 1986. *See* Cal. Civ. Code § 1431.2 (2001). Under California law, defendants are liable only for their "fair share" of responsibility for a claimant's *noneconomic* damages, i.e., "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." Cal. Civ. Code 1431.2(b)(1). With respect to *economic* damages – medical expenses, lost earnings, property losses, and the like, *see* Cal. Civ. Code 1431.2(b)(2) –

joint liability governs, ensuring that claimants can recover full compensation for such losses. The same approach has been adopted by Nebraska. *See* Neb. Rev. Stat. § 25-21,185.10 (2001). And other states have adopted similar provisions. *See* Iowa Code § 668.4 (2001) (abolishing joint liability for noneconomic damages and abolishing joint liability for economic damages for defendants less than 50% at fault); N.Y. C.P.L.R. Law §§ 1601-1602 (Consol. 2001) (abolishing joint liability for noneconomic damages for defendants less than 50% at fault, with certain exceptions); Ohio Rev. Code Ann. § 2315.19 (Anderson 2001) (abolishing joint liability for noneconomic damages when the plaintiff was contributorily negligent or impliedly assumed the risk that caused the harm).

The California rule works, and would be fair in asbestos cases.[15] As the Restatement explains:

> Treating economic damages as a higher priority than noneconomic damages for joint and several liability has substantial, although not universal, support both in theory and practice. Many no fault compensation systems evidence a primary concern with replacing an injured plaintiff's lost wages and medical expenses and providing adequate compensation for future losses of those types, while eschewing payment for pain, suffering, and other noneconomic loss. While tort law and joint and several liability are not a no-fault compensation system, the

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[15] There have been virtually no reported cases in California involving disputes over whether a given loss should be characterized as economic or noneconomic. *See* Restatement § E18 cmt. c. California's law also has survived scrutiny under the state and federal equal protection clauses. *See Evangelatos v. Superior Ct.*, 753 P.2d 585 (Cal. 1988).

> choices made in the latter reflect the priority for compensation for economic loss.

Restatement § E18 cmt. D.

Finally, there is support for this approach in federal law. Under the federal Volunteer Protection Act of 1997 and No Child Left Behind Act of 2001, several or "fair share" liability is adopted for noneconomic damages only.[16] Recovery of economic damages, on the other hand, is governed by state law. This allows for joint liability as to economic damages in the minority states that have retained the doctrine, but avoids the creation of new liability for defendants in states that have abolished or modified the doctrine.

Adoption of "fair share," or several, liability under FELA would be the most effective way to avoid imposing unfair burdens on peripheral defendants, curb asbestos-related bankruptcies, and preserve assets for the truly sick. If the Court declines to adopt pure several liability under FELA, then the California rule may provide an alternative. The one approach that makes no sense at all is that adopted below: a pure joint liability rule that is inconsistent with evolving common law principles, FELA's own approach to apportionment, and sound public policy.

CONCLUSION

For the foregoing reasons, *amici* request that this Court set aside the judgment below and order a new trial in this case.

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[16] *See* 42 U.S.C. § 14504 (2001) (abolishing joint liability for noneconomic damages in actions against volunteers of nonprofit organizations); Pub. L. No. 107-110, § 2367, 115 Stat. 1670 (2002) (to be codified at 20 U.S.C. § 6737) (abolishing joint liability for noneconomic damages in actions against teachers, principals, school board members, and other school professionals).

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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF AMERICAN LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under the Federal Employers Liability Act ("FELA"), a defendant whose negligence has been found to be an actual and proximate cause of a single, indivisible injury to the plaintiff should be liable for only a portion of the injury to which it contributed.

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned professors of law at American law schools (See Appendix for biographical information of each *amicus curiae*), have a strong interest in this case for two reasons.

First, *amici*, all of whom teach, research, and write about tort law, have a strong interest in the proper development, exposition, and application of just principles of tort liability in all its various manifestations, including the Federal Employers' Liability Act (FELA). This Court's pronouncements on major principles of tort liability, such as the principles at issue in this case governing the proper allocation of liability among the multiple responsible causes of an injury, will have great influence not only on actions under FELA, but also on actions under tort law in general, federal admiralty law, environmental law, and many other areas of law.

Second, *amici*, as both teachers of law and lawyers, have a strong interest in the accurate exposition of legal cases, history, and principles in legal education and legal practice. We believe the petitioner's brief seriously misstates the past and present state of the law regarding the allocation of liability among the multiple responsible causes of an injury.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioner asserts that the traditional common law used fractional apportionment of liability (proportionate several liability), rather than joint and several liability or full several (separate) liability, for all cases other than those involving tortfeasors acting in concert; that this was the state of the law at the time that the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, was enacted in 1908; that FELA incorporates the common law's supposed preference for proportionate several liability; that joint and several

liability for independent tortfeasors existed only for a brief period during the middle of the twentieth century; and that the evolving common law, the Restatements, and just principles of liability support proportionate several liability.

All of these assertions are clearly incorrect.

Petitioner's description of the common law at the time of FELA's enactment misunderstands and confuses the distinct rules and doctrines governing procedural joinder and substantive liability. Under both the common law and federal admiralty law at the time of FELA's enactment, and long before, each defendant who tortiously contributed to a plaintiff's injury was fully liable for that injury, regardless of whether other tortious causes of the plaintiff's injury could be joined in the same lawsuit. See Part A *infra*.

Joint and several liability was intended and has been consistently employed by federal and state courts under FELA from the time of FELA's enactment. See Part B *infra*.

Under joint and several liability, a defendant generally is only liable for injuries for which it is fully responsible as a tortious, actual, and proximate cause. See Part C *infra*.

Under the evolving common law, joint and several liability continues to be overwhelmingly recognized as the fairest method of allocating liability among multiple responsible causes of an injury. See part D *infra*.

There is no basis for this Court to undertake the major step of discarding and overruling its own precedents and the universal understanding and practice of the federal and state courts over the last almost 100 years, which have uniformly held that joint and several liability is an integral part of FELA's comparative-responsibility liability regime, furthers FELA's broad remedial purposes, and is consistent with over 100 years of similar understanding and practice in both the common law and federal admiralty law.

ARGUMENT

A. Under the Common Law and Federal Admiralty Law at the Time of FELA's Enactment, and Long Before, Each Defendant Who Tortiously Contributed to a Plaintiff's Injury Was Fully Liable for That Injury, Regardless of Whether Other Tortious Causes of the Plaintiff's Injury Could Be Joined in the Same Lawsuit

The petitioner asserts that, under the common law at the time of FELA's enactment in 1908, apportionment of fractional liability among the multiple tortious causes of a plaintiff's injury was the "dominant," "general," "overwhelming" rule, and that defendants were held fully liable for an injury to which they contributed only if they acted in concert or with unity of purpose. Petitioner's Brief at 12-13, 32 & n.26, 34-36, 39-40, 49. This assertion is clearly incorrect. It is based on a confusion and misunderstanding regarding the traditional use of the terms "joint" and "several" to describe the distinct procedural and substantive aspects of liability – a confusion and misunderstanding that is warned against in the very sources that are cited by petitioner. *See, e.g.*, W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 413 (1937) ("the separate problems of joinder of parties in the same action, as a matter of procedure, and the substantive liability of two or more parties for the same result, require separate consideration, and have very little in common").

The terms "joint tort," "joint liability," and "joint tortfeasors" initially were primarily procedural terms that were applied to situations in which defendants could be joined in the same lawsuit, which under the traditional common law was allowed only in situations involving concerted action, in which each tortfeasor could be held liable for the consequences of each other's acts as well as

their own acts, or vicarious liability. *Id.* at 413-15, 430; J. Fleming, *The Law of Torts* 255 (8th ed. 1992).

Independently acting tortfeasors who tortiously contributed to the same injury, who in England are still called "concurrent tortfeasors" rather than "joint tortfeasors," could not be joined in the same action, yet each was "severally" (separately) liable for the entire injury. Fleming at 257-58; Prosser at 414-15, 418-19, 424, 439. As the *Restatement Third* notes, "before the advent of comparative responsibility, 'several liability' was employed to describe a defendant who was responsible for all of the plaintiff's damages but who could not be joined in a suit with any other defendant who may also have been responsible," as well as other situations in which different defendants caused separate injuries to the same plaintiff and were held "severally" (fully) liable "for the portion of the plaintiff's injury caused by that defendant." *Restatement (Third) of Torts: Apportionment of Liability* § 11 cmt. a, reporters' note at 109-110 (2000) (citation omitted) [*Restatement Third*].[1]

Procedural joinder of independently acting tortfeasors is now allowed, indeed encouraged, and it therefore is customary in the United States to refer to such independently acting tortfeasors, as well as tortfeasors acting in concert, as "joint tortfeasors." But, contrary to the

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[1] The petitioner's failure to distinguish the procedural joinder issue from the substantive liability issue is exemplified by its discussion of *McGannon v. Chicago & Nw. Ry.*, 199 N.W. 894 (Minn. 1924), in which the court merely held, following the restrictive procedural joinder rules then in effect, that the plaintiff's joinder as defendants in the same action of two successive employers who exposed the plaintiff to airborne sand and fumes at the same job site was improper because the employers had not acted in concert and their independent acts, which the court assumed resulted in two distinct injuries, "were not concurrent either in point of time *or in result*." *Id.* at 894, 895 (emphasis added).

assertions of petitioner, this procedural change did not result in any change in substantive liability.

Both before and after this procedural change, each tortfeasor, whether acting in concert or independently, was fully liable for the entirety of any injury that was caused by its tortious conduct, regardless of whether other tortfeasors or natural events also contributed to the same injury. (However, a plaintiff's total aggregate recovery from all the contributing tortfeasors can never exceed the amount of his actual damages.) *See, e.g., Miller v. Union Pacific R. Co.*, 290 U.S. 227, 236 (1933) ("The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone.") (citing a number of U.S. Supreme Court and federal Circuit Court cases from the 19th and early 20th centuries); *Pacific Tel. & Tel. Co. v. Hoffman*, 208 F. 221, 227 (9th Cir. 1913) ("[I]f concurring or successive acts of negligence of numerous persons combined together caused the plaintiff's injury, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury."); *Restatement Third* § 10 cmt. b, reporters' note at 104; C. Baker, *Tort* 142-43 (4th ed. 1986); 3 F. Harper et al., *The Law of Torts* § 10.1 at 1, 3-5, 7-10 (2d ed. 1986) [*Harper, James & Gray*]; W.P. Keeton et al., *Prosser and Keeton on the Law of Tort* § 46 at 322, § 47 at 324-29 (5th ed. 1984) [*Prosser & Keeton*].

Moreover, as the *Restatement Third* states, "Many courts, even before the 20th century, [allowed procedural joinder and thus] imposed joint and several liability on independent tortfeasors when their acts caused truly indivisible harm." *Restatement Third* § A18 cmt. a, reporters' note at 163 (citing Prosser, 25 Cal. L. Rev. at 418-19 & nn.35-38; Jackson, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 406 n.28, 408 n.35 (1939)). It traces such joint and several liability for independent tortfeasors at least as far back as 1771. *Id.*

At the time that FELA was enacted, joint and several liability for independent tortfeasors had already been firmly established in federal admiralty law as part of a comparative-responsibility regime that was in place long before the adoption of such regimes by the States:

> [T]he general maritime law has long recognized the concept of joint liability. For example, in *The Atlas*, 93 U.S. 302 (1876), the Supreme Court held that the insurer of cargo lost in a collision between two vessels caused by the fault of both could recover all of its damages from one vessel. The Court borrowed this rule from the common law, which recognized a plaintiff's right "to sue . . . all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." *Id.*, at 315; *see also The Alabama*, 92 U.S. 695 (1876); *The George Washington*, 76 U.S. 513 (1870); The *Juniata*, 93 U.S. 337, (1876); *The Sterling*, 106 U.S. 647 (1882) (describing the joint liability rule in admiralty as "well-established").

Simeon v. T. Smith & Son, Inc., 882 F.2d 1421, 1428 (5th Cir. 1988) (parallel citations omitted).

The common-law rule barring any recovery by a contributorily negligent plaintiff was replaced by a rule of *per capita* divided damages for vessel collision cases in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), and disagreement over its application outside the collision context was resolved in *The Max Morris*, 137 U.S. 1 (1890), which definitively replaced the prior rule with a rule of comparative responsibility. As the *Simeon* court observed, "Neither the Supreme Court nor the lower courts have ever retreated from the rule of joint liability under maritime law." *Simeon*, 852 F.2d at 1428 (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n. 7 (1979); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 2178 (1974); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042 (5th Cir. 1985); *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745, 756 (5th Cir. 1985); *Central Rivers Towing, Inc. v. City of Beardstown, Ill.*, 750 F.2d 565, 575 (7th Cir. 1984).)[2]

During the recent era of "tort reform," the term "several liability" has come to mean fractional or partial liability, rather than full liability, for the harm to which one contributed. As the *Restatement Third* notes, this use of the term "several liability" is "imprecise and potentially confusing" and historically inaccurate, for the reasons discussed above. *Id.* § 11 cmt. a, reporters' note at 109-110. However, deferring to the now prevalent usage, the *Restatement Third* uses the term "several liability" in its current sense of fractional or partial rather than full liability. *Id.* A more precise and less confusing term for such fractional or partial liability, which will henceforth be used in this brief, is "proportionate several liability." *See Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1084-89 (Ill. 1997); R. Wright, *Allocating Liability Among Multiple Responsible Causes: Joint and Several Liability for Actual Harm and Risk Exposure*, 22 U.C. Davis L. Rev. 1141, 1142, 1165-68 (1985) [Wright, *Allocating Liability*].

B. Joint and Several Liability Has Been Consistently Employed under FELA from the Time of FELA's Enactment

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[2] The Petitioner's Brief, at 43 n.38 & 46 n.43, implies that this Court adopted proportionate several liability in admiralty law in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). However, *Reliable Transfer* merely replaced the antiquated rule of *per capita* divided damages in the collision context with a rule of comparative responsibility. *See id.* at 397-99, 410-11. The Court explicitly stated that its holding "would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established . . . for personal injury cases." *Id.* at 409.

The petitioner asserts that Congress intended to incorporate proportionate several liability rather than joint and several liability as part of FELA's comparative-responsibility liability regime. Petitioner's Brief at 31-33 & n.26. This also is clearly incorrect. The petitioner bases its argument almost entirely on an assumption that proportionate several liability, rather than joint-and-several or full-several liability, was the general rule at the time that FELA was enacted – an assumption that, as was discussed in Part A *supra*, is completely false with respect to both the common law and the comparable federal admiralty law.

As this Court emphasized in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), FELA "expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." *Id.* at 507 (emphasis in original) (citing 35 Stat. 65, 45 U.S.C. § 51). The Court properly rejected the Missouri court's insistence on "but for" causation as an unduly restrictive concept of causation: "Under [FELA] the test . . . is simply whether the proofs justify with reason the conclusion that the employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506.

The petitioner asserts that, under *Rogers*, defendants are subjected to a "reduced causation standard" that holds them liable for damage they did not cause and that is different and significantly lower than the causation standard that is applied in their contribution claims against others who contributed to the same injury. Petitioner's Brief at 46-48. This also is not correct. Petitioner admits that a plaintiff in a FELA action must prove that the defendant's tortious conduct contributed to his injury. *Id.* at 48 & n.45. Petitioner cites Prosser's discussion of the "substantial factor" formula to support its claim that "[c]ausation requirements are often relaxed in toxic exposure cases to permit plaintiffs to recover more readily." *Id.* at 46 n.42 (citing *Prosser & Keeton* at 267-68). However, the "substantial factor" formula is routinely

invoked by courts inside and outside of tort law, along with simple "contribution" tests, to avoid incorrect findings of no causal contribution under the but-for test when there are multiple sufficient causes of an injury. *See Restatement (Second) of Torts* §§ 431 & 432 (1965); *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* § 27 & cmts. a, b, f, g (Tentative Draft No. 2, March 25, 2002) [*Restatement Third: Basic Principles*]; R. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 Vand. L. Rev. 1071, 1075-80, 1097-1109 (2001) [Wright, *Legal Responsibility*].

The courts have uniformly interpreted FELA, consistent with the common law and federal admiralty law at the date of its enactment and thereafter, as imposing full liability on the employer (after reduction for any contributory negligence by the plaintiff) for any injury that was contributed to by the employer's negligence, despite other contributing causes. For example, in *Husky Refining Co. v. Barnes*, 119 F.2d 715 (9th Cir. 1941), in which a railroad motorman was killed in a collision between a truck and the train on which he was working, the court held that, although the two defendants were not "joint tortfeasors," since they were not acting in concert, they were each (including the railroad under FELA) fully liable for the plaintiff's injury: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held liable for the entire damage – not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." *Id.* at 716 (citations omitted).

See, e.g., Jenkins v. Southern Pac. Co., 17 F. Supp. 820, 824-25 (S.D. Cal. 1937) (various parties responsible for the death of a railroad conductor as a result of his being assaulted by a passenger on the train, including the railroad under FELA, held jointly and severally liable for entire damages), *rev'd on other grounds, Jenkins v. Pullman Co.*, 96 F.2d 405 (9th Cir. 1938), *aff'd, Pullman Co. v. Jenkins*, 305 U.S. 534 (1938);

Louisville & N.R. Co. v. Allen, 65 So. 8, 12 (Fla. 1914) (railroad employer liable under FELA and third party liable under state law each jointly and severally liable for railroad employee's entire injury); *Riley v. Minneapolis & St. L.R. Co.*, 156 N.W. 272, 273 (Minn. 1916) (same); *Lindsay v. Acme Cement Plaster Co.*, 190 N.W. 275, 278 (Mich. 1922) (same); *Demopolis Tel. Co. v. Hood*, 102 So. 35, 37 (Ala. 1924) (railroad employer liable under FELA and third party liable under state law each severally liable for railroad employee's entire injury); *Southern Ry. Co. v. Blanton*, 10 S.E.2d 430, 436-37 (Ga. App. 1940) (railroad employer liable under FELA and third party liable under state law each proximate cause of and liable for railroad employee's entire injury); *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 389-91 (Ks. 1982) (despite adoption of proportionate several liability for state tort law claims and lack of provision for contribution or indemnity action against third party tortfeasor in FELA, railroad employer is fully liable under FELA for injury to employee resulting from collision with truck at railroad crossing, and railroad can maintain contribution or indemnity action against the truck driver); *Narcise v. Illinois C. G. R. Co.*, 427 So. 2d 1192, 1195-96 (La. 1983) (certified question from U.S. Court of Appeals for the Fifth Circuit) (solidary [joint and several] liability exists between defendant railroad liable under FELA and third party liable under state tort law, and defendant railroad can maintain contribution or indemnity action against third-party tortfeasor); *Bean v. Missouri Pac. R. Co.*, 525 N.E.2d 1231, 1234 (Ill. App. 1988) (railroad defendant under FELA and third-party tortfeasor under state tort law are joint tortfeasors who can maintain contribution claims against one another); *Gilbert v. CSX Transp., Inc.*, 397 S.E.2d 447, 450 (Ga. App. 1990) (same); *Lewis v. Nat'l R. Passenger Corp.*, 675 N.Y.S.2d 504, 505-06 (Civil Ct. NYC 1998) (state proportionate-several-liability statute cannot be used in FELA action to limit the defendant railroad's full liability); Annotation, *Right of Railroad, Charged with Liability for Injury to or Death of Employee under Federal Employers Liability Act, to Claim*

Indemnity or Contribution from Other Tortfeasor, 19 A.L.R.3d 928, 931 (1968).

C. Under Joint and Several Liability, a Defendant Generally Is Only Liable for Injuries for Which it Is Fully Responsible as a Tortious, Actual, and Proximate Cause

The petitioner asserts that, in any case in which there are multiple contributing causes of a plaintiff's injury, including even innocent human and natural causes (which will always exist), holding the defendant fully liable for the injury to which it contributed (under the doctrine of joint and several liability or otherwise) results in the defendant being held liable for more damages than she tortiously caused or for which she was responsible. See Petitioner's Brief at 1-2, 31-33 & n.26, 40 & n.35, 43 n.38, 46-47. As the courts have almost universally noted in upholding the doctrine of joint and several liability after the adoption of comparative responsibility, this assertion is false.

For example, in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), the Supreme Court of Illinois stated:

> We note that the proposition which defendants offer as the primary explanation for abolishing the doctrine of joint and several liability, *i.e.*, the assertion that the doctrine requires tortfeasors to pay for more damages than they caused, is at odds with this court's explanation of joint and several liability in [*Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (1983)] . . . [T]he *Coney* court stated:
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> > "The feasibility of apportioning fault on a comparative basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule. *A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage.* *** The mere

> fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another *does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.*" (Emphasis added.)

The principle that tortfeasors who are held jointly and severally liable are each fully responsible for the entirety of the plaintiff's injury has been explained:

> "Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury *only if her tortious behavior was an actual and proximate cause of the entire injury*. [Emphasis added.] She is not liable for injuries, including separable portions of injuries, to which she did not contribute. She is not liable unless the tortious aspect of her conduct was an actual cause of the injury. Moreover, even then, she is not liable if, for reasons of policy or principle, her connection to the injury is considered too remote or minimal to be 'proximate.'"

Id. at 1086 (citations omitted).

As the *Best* court noted, *id.* at 1087, there is a fundamental difference between each tortfeasor's *individual full responsibility* for an injury that it tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the tortfeasors' individual full responsibilities for the injury. For example, if two defendants were each negligent, actual, and proximate causes of a plaintiff's injury, neither is merely "50% negligent," a cause of only 50% of the injury, or only "50% responsible." Such statements make as much sense as saying that someone is 50% pregnant or

caused 50% of a death or a broken leg. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual and proximate cause of 100% of the injury. Each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury.

Like the *Best* court, the vast majority of State courts have held that a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. See part D *infra*. Rather, as the courts have held, such concurrent contribution to an injury by multiple tortfeasors provides a basis for claims *among the tortfeasors themselves*, in the form of contribution or indemnity actions, for an equitable sharing of their joint and several liability to the plaintiff based on their comparative responsibility.

A tortfeasor's individual full responsibility for an injury is most obvious when its tortious behavior was either necessary or independently sufficient for the occurrence of the injury. *See* Prosser at 432-34. Yet, under the petitioner's proportionate-several-liability approach, each of 100 defendants would only be liable for one percent of an injury even if each was an independently sufficient cause of the injury – for example, if each of 100 defendants (intentionally or negligently) independently fired a fatal bullet into the plaintiff's brain or negligently put sufficient poison in the plaintiff's coffee to cause death.[3]

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[3] A draft of the *Restatement Third: Basic Principles* would treat "trivial and insubstantial contributions" to an injury as an actual cause of the injury, but not as a proximate cause unless the trivial or insubstantial contribution was a necessary ("but for") cause of the injury: "the actor who tortiously provides the straw that

The full-responsibility argument may seem less intuitively obvious when, as in some pollution and toxic exposure cases, the defendant's tortious conduct clearly contributed to an indivisible injury, but it was neither necessary nor independently sufficient to cause the injury. For example, assume that three drops of poison are necessary for a coffee drinker's death, and that four tortfeasors, acting independently of one another, each negligently put one drop of poison in the coffee cup.

It clearly would not be correct to assert that each defendant was only "25% negligent" or caused only one-fourth of the coffee drinker's death. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual cause of the coffee drinker's indivisible death and all the consequent damages. *See Restatement Third: Basic Principles* § 27 & cmts. a, f, g; Wright, *Legal Responsibility*, at 1100-01, 1106-08.

If there had been only three defendants, each of them clearly would have been individually fully responsible as a necessary ("but for") cause of the injury. It is not clear why this individual full responsibility should be reduced to responsibility for only one-fourth of the injury merely because a duplicative drop of poison was added by a fourth defendant. Such a result would potentially subject plaintiffs

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breaks the camel's back is subject to liability for the broken back." *Restatement Third: Basic Principles* § 29 cmt. q. Presumably, a tortious contribution that is *independently sufficient* for an injury is neither trivial nor insubstantial, regardless of how *de minimus* it might be in relation to the aggregate contributing causes. Similarly, a tortious contribution should not be deemed trivial or insignificant, even if it is neither necessary nor independently sufficient and is *de minimus* in relation to the aggregate causal contributions, if it is not *de minimus* in relation to the other contributions individually. The draft Restatement's illustrations refer to contributions that are trivial and insignificant in comparison to the other distinct contributions to the injury, rather than in comparison to all the causal contributions in the aggregate.

to a perverse "tortfest," in which the more tortfeasors there were, the less liable each would be, although the tortious behavior of each defendant remained constant and was an actual cause of the plaintiff's entire injury.

Thus, when there are multiple tortious contributions to a single, indivisible injury, none of which by itself was either necessary or independently sufficient for the occurrence of the injury, many courts have held the tortious contributing causes jointly and severally liable. Other courts have treated the injury as being theoretically divisible into separately caused portions, even when it clearly was not, to justify a shift to what amounted to proportionate several liability. *See* 3 *Harper, James & Gray* § 10.1 at 25-29; 4 *id.* § 20.3 at 120-21, 125-26 & nn.28-30; *Prosser & Keeton* § 52 at 345-46, 349, 351, 354-55.[4]

The *Restatement Second* uncomfortably reflects this division of authority. It would allow defendants in such situations to be liable for only a portion of the resulting damages if there was a reasonable basis for apportionment or division according to the relative contribution of each defendant. *See Restatement Second* §§ 433A & 881. However,

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[4] It has been suggested that the reluctance of the second group of courts to impose joint and several liability was due to the former rule that did not allow a tortfeasor who initially paid for the injury to obtain contribution from the other tortfeasors. *Prosser & Keeton* § 52 at 349. This reluctance should be substantially diminished when, as is true in almost all jurisdictions today, contribution is permitted based on the tortfeasors' comparative responsibility. Indeed, as is discussed further in Part D *infra*, two of the most frequent exceptions in the statutes eliminating, limiting, or modifying joint and several liability have been the exceptions that retain joint and several liability in situations involving environmental pollution or toxic substances.

its illustrations inconsistently treat very similar situations as being or not being "divisible" or "apportionable."[5]

However, in illustrations 14 and 15 to § 433A, in which two defendants similarly each negligently discharge oil into a stream, and the combined oil in the stream is ignited and the fire spreads to and burns down plaintiff's barn (illus. 14) or is drunk by the plaintiff's cattle which are thereby poisoned and die (illus. 15), the plaintiff's injuries are deemed indivisible and each defendant is fully (jointly and severally) liable for the entirety of plaintiff's damages. This is so, apparently regardless of the ability to measure the defendants' relative contributions of oil, because "certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. . . . [I]t is impossible . . . to say that one man has caused [part] of it and another the rest." *Id.* comment *i*. This is stated to be true for all or almost all injuries to persons or tangible property. *Id.*

Some of the pollution or toxic-exposure cases involve situations in which there are, or may be, theoretically separable injuries attributable to distinct causes, but it is practically impossible to distinguish the separable injuries and their distinct causes. These cases are similar to the multiple collision cases, in which the first defendant negligently caused the initial collision, which resulted in

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[5]For example, in *Restatement Second* § 433A illustration 5, two defendants each negligently discharge oil into a stream, making the water unusable for industrial purposes by a lower riparian property owner. The injury to the plaintiff is treated as being divisible or apportionable, apparently because the respective contributions to the combined pollution can be measured (70% and 30%, respectively). Similarly, in Restatement 2d § 881 illustration 2, in which three defendants operating smelter plants in a farming community "each send out fumes of equal concentration that unite and denude the grass of a nearby farmer, each defendant is said to be liable only for "the proportion of the total harm that his proportion of the fumes bears to the total amount of fumes."

some injury to the vehicle or person of the plaintiff, and a second plaintiff negligently caused the second collision, causing additional injury to the vehicle or person of the plaintiff. Assuming the second collision would not have occurred in the absence of the first collision, the first defendant's negligence was a necessary (but for) cause of both the initial and additional injuries, and she therefore is responsible for all of the injuries. However, the second defendant's negligence was only a cause of the additional injury due to the second collision.

Another group of similar cases is the animal trespass cases, in which, for example, trespassing cattle belonging to different defendants consumed the plaintiff's crops, or dogs belonging to different defendants killed the plaintiff's sheep. In these cases, each defendant's animal caused theoretically separable injuries to the plaintiff. Cases involving multiple sources of pollution sometimes are analogized to the multiple animal cases, but most of the pollution cases are instead similar to the coffee drinker hypothetical, in which each drop of poison (pollution) contributed to the entire injury.

When there are theoretically separable injuries attributable to distinct causes but it is difficult or impossible to actually distinguish (even roughly) the injuries or their causes, the modern approach has been to hold each defendant who tortiously contributed to (at least some of) the injuries jointly and severally liable for all the injuries, unless the tortfeasor can prove that she did not contribute to some separable portion of the injuries or could only have contributed to a certain maximum portion. *See Michie v. Great Lakes Steel Division*, 495 F.2d 213 (6th Cir. 1974); *Maddux v. Donaldson*, 108 N.W.2d 33 (Mich. 1961); *Restatement Second* § 433B(2); *Restatement Third* § 11 cmt. b at 109, § C18 cmt. a & reporters' note; 3 *Harper, James & Gray* § 10.2, at 26-29; 4 *id.*, § 20.3, at 117-18, 124 n.27, 127-29 & n.32; *Prosser & Keeton* § 52, at 345-46, 348-53.

Restatement Third § 26 replaces the *Restatement Second*'s ambiguous provisions and conflicting illustrations. *See id.* cmt. b. It rejects the petitioner's position, that damages or injuries should be treated as divisible based merely on relative causal contribution or percentages of comparative responsibility, *see* Petitioner's Brief at 40-41 & 49, and instead treats them as being divisible only if there truly are separable injuries or losses that can be attributed to different persons based on causation. *Restatement Third* § 26 & cmts. a, c, d & h. Damages are divisible only "when the evidence provides a reasonable basis for the factfinder to determine: (1) that [a person's tortious conduct] "was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct." *Id.* § 26.

The illustrations in the *Restatement Third* all relate to successive injury cases where there are theoretically and practically separable injuries. Although all that is required is a reasonable basis for division, *id.* cmt. f, the burden is on the party alleging divisibility (normally the defendant) to prove the divisible damages or injuries, based on causation, with sufficient evidence. "Unless sufficient evidence permits the factfinder to determine that damages are divisible, they are indivisible." *Id.* cmt. g. As is discussed in Part D *infra*, the *Restatement Third* would leave the issue of the allocation of liability for indivisible (inseparable) injuries to the disparate law of the various states. *Id.* §§ 17 & 26.

D. Under the Evolving Common Law, Joint and Several Liability Continues to Be Overwhelmingly Recognized as the Fairest Method of Allocating Liability among the Multiple Responsible Causes of an Injury

Petitioner asserts that, except for a period during the middle of the twentieth century, the evolving common law (including federal law) has retained a supposed preference for fractional apportionment of liability among the

contributing causes of a plaintiff's injury. Petitioner's Brief at 12-13, 32, 39-40, 42-43, 49-50. Again, this assertion is clearly incorrect.

Pure joint and several liability is the universal rule in common-law and civil-law regimes outside the United States, almost all of which employ comparative-responsibility principles.[6] It also is overwhelmingly preferred by courts in the United States. As was discussed in Part A *supra*, this Court has consistently employed joint and several liability as part of a comparative-responsibility regime in federal admiralty law since the 19th century. *See Restatement Third* § C21 cmt. a, reporters' note at 214.

All but a handful of State supreme courts have concluded that joint and several liability should be retained rather than being replaced by proportionate several liability under a comparative-responsibility liability regime. *See, e.g., Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Walton v. Tull*, 356 S.W.2d 20, 26 (Ark. 1962); *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978); *Tucker v. Union Oil Co. of California*, 603 P.2d 156, 163-69 (Idaho 1979); *Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (Ill. 1983); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1084-89 (Ill. 1997); *Rozevink v. Faris*, 342 N.W.2d 845 (Iowa 1983); *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849 (Minn. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984); *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1311-14 (Wash. 1978); *Sitzes v. Anchor Motor Freight*, 289 S.E.2d 679, 684-85 (W. Va. 1982); *Wisconsin Natural Gas Co. v. Ford*,

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[6] *See* Fleming at 275-76; A.M. Honoré, *Causation and Remoteness of Damage*, in XI *International Encyclopedia of Comparative Law, Torts, Pt. 1*, §§ 7-141, 7-189(2), 7-193 (A. Tunc ed. 1983); C. von Bar, 1 *The Common European Law of Torts* 334-38 (1998); A. Weir, *Complex Liabilities*, in XI *International Encyclopedia of Comparative Law, Torts, Pt. 2*, §§ 12-79 to -86, 12-105 to -109, 12-131 to -133 (A. Tunc ed. 1983).

Bacon & Davis Constr. Corp., 291 N.W.2d 825, 833-35 (Wisc. 1980).

As the *Restatement Third* states,

> The joint and several liability of negligent parties acting independently who cause a single indivisible injury gained wide acceptance before the tort-reform legislation of the mid and late 1980s. This was true whether the injury was one that was truly indivisible (such as two vehicles colliding and breaking the plaintiff's leg) or was theoretically divisible, but, because of problems of proof, could not be apportioned based on the causal roles of each defendant (e.g., marauding cattle belonging to several defendants who destroy a field of crops).

Restatement Third § A18 cmt. a, reporters' note at 163 (citation omitted); *see Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983) ("[O]f the thirty-eight other states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a [limited or] modified form, and only three have done away with it (two by statute, one by court decision)."); 3 *Harper, James & Gray* § 10.1 at 29-30; 4 *id.* § 22.17 at 413-16; *Prosser & Keeton* § 67 at 475; V. Schwartz, *Comparative Negligence* § 16.4, at 258-61 (2d ed. 1986); W. McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 Okla. L. Rev. 1, 3-4 (1979).

The shifts away from pure joint and several liability almost all occurred as a result of legislative action during the 1980s and early 1990s, rather than through judicial elaboration of the common law. *See Restatement Third* § B18 cmt. a, reporters' note at 170-71. The three State courts that replaced joint and several liability with proportionate several liability in whole or part mistakenly assumed, like the petitioner, that joint and several liability results in a

defendant's being held liable for more than it caused or is responsible for.[7]

The same erroneous assumption, together with other erroneous arguments – for example, that joint and several liability for independently acting tortfeasors was an anomalous mid-twentieth-century development that was inconsistent with the earlier common law – motivated the legislative changes in the joint and several liability doctrine during and following the liability insurance crisis in the mid-1980s. *See* Wright, *Allocating Liability*, at 1165-68; R. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis St. U.L. Rev. 45 (1992); R. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. Davis L. Rev. 1147 (1989).

Yet, contrary to the implication of the petitioner, *see* Petitioner's Brief at 13, 32, 39-40, 42-43, joint and several liability has been replaced with proportionate several liability (and, even then, never entirely) in only a few states. The *Restatement Third* summarizes: "There currently is no majority rule . . . , although joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform

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[7] *See Bartlett v. New Mexico Welding Supply*, 646 P.2d 579, 582 (N.M. App. 1982) (assuming the doctrine "hold[s] a person liable for an amount greater than the extent that person caused injury"), *cert. denied*, 648 P.2d 784 (N.M. 1982); *Laubach v. Morgan*, 588 P.2d 1071, 1074 (Okla. 1978) ("By doing away with joint liability plaintiff will collect his damages from the defendant who is responsible for them."), *limited by Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980) (noting criticisms of *Laubach* by McNichols, *supra*, and retaining joint and several liability for innocent plaintiffs); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) (assuming that adoption of proportionate several liability was necessary to ensure that "a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence").

during the 1980s and 1990s." *Restatement Third* § 17 cmt. a at 147.

The following listing of the rules in the various states is based on the tabulation in the *Restatement Third* § 17 cmt. a, reporters' note at 151-59, unless otherwise noted.

- Only sixteen states (Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Mexico, North Dakota, Tennessee, Utah, Vermont, and Wyoming) have adopted pure proportionate several liability, subject to various exceptions. For example, Alaska, Idaho, and Nevada retain joint and several liability for claims involving hazardous or toxic substances. Arizona preserves joint and several liability for liability arising under FELA (Ariz. Rev. Stat. Ann. § 12-2506(D)(3) (West Supp. 2001)). New Mexico preserves joint and several liability for claims involving products and situations having a sound basis in public policy.

- Fifteen jurisdictions (Alabama, Arkansas, D.C., Delaware, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia) have retained pure joint and several liability, with certain limitations in Minnesota and South Dakota.

- Two states (Missouri and Oregon) have retained joint and several liability with reallocation of uncollectible shares, which is equivalent to pure joint and several liability for non-negligent plaintiffs; Oregon retains pure joint and several liability for claims based on hazardous waste or water or air pollution.

- One state (Connecticut) employs proportionate several liability but reallocates uncollectible shares; for economic damages, the reallocation takes place only among the tortfeasors. Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1988).

- Three states (Georgia, Oklahoma, and Washington) have retained joint and several liability unless the plaintiff was contributorily negligent. Washington retains joint and several liability regardless of the plaintiff's contributory negligence for claims involving products, hazardous materials, or tortious interference with contract.

- Two states (Hawaii and New York) retain joint and several liability for economic damages and, if the defendant's comparative responsibility is equal to or greater than a certain percentage (25% in Hawaii, 50% in New York), also for noneconomic damages. However, each state retains pure joint and several liability for the most prevalent types of claims: Hawaii for environmental, plane-crash, toxic, product, asbestos, and motor-vehicle claims; New York for environmental, product, motor-vehicle, and gross negligence claims.

- Six states (Illinois, Montana, New Hampshire, New Jersey, Texas, and Wisconsin) retain joint and several liability for economic and noneconomic damages if the defendant's comparative responsibility is more than a certain percentage, ranging from 25 to 60 percent. Montana and New Hampshire reallocate uncollectible shares. Illinois (Ill. Comp. Stat., ch. 735, ¶ 5/2 -1118 (1992)) and New Hampshire retain pure joint and several liability for environmental pollution claims. New Jersey and Texas have much lower thresholds (5% and 15%) for joint and several liability for environmental claims.

- One state (Mississippi) retains joint and several liability for up to 50 percent of the recoverable damages.

- Three states (California, Florida, and Nebraska) retain joint and several liability for economic damages only, subject to various thresholds and caps in Florida except for pollution claims and claims for $25,000 or less.

- Two states (Iowa and Ohio) retain joint and several liability only for economic damages and only if the defendant's percentage of comparative responsibility is greater than or equal to 50 percent. Ohio's 1996 omnibus "tort reform" statute was voided in its entirety by the Ohio Supreme Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (1999).

As can be seen from the above listing, a substantial majority of the states, including many of those adopting pure proportionate several liability for most situations, retain joint and several liability for claims involving environmental pollution and/or toxic substances. Federal and state agencies often stress the need to retain joint and several liability in such situations. For example, the Reagan Administration's Tort Policy Working Group sought to preserve the government's ability to hold polluters jointly and severally liable under federal environmental statutes, which "are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. . . . Without some degree of joint and several liability under [these statutes], the effective enforcement of these programs could be impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs." U.S. Att'y Gen. Tort Policy Working Group, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 65 n.7(Feb. 1986).

The *Restatement Third* and all or almost all states also retain joint and several liability for intentional tortfeasors, tortfeasors acting in concert, tortfeasors who negligently fail to protect plaintiffs from intentional injury by another, and tortfeasors who are vicariously liable for injuries tortiously caused by others. *Restatement Third* §§ 12-15.

Otherwise, and again contrary to the petitioner's implication, *see* Petitioner's Brief at 40-43, 49, the *Restatement Third* formally takes no position on the preferred rule, rather deferring to the disparate rules adopted in each State. *See Restatement Third* § 17 & cmt. a. However, in its discussion of the principal variations, it makes clear its distaste for pure proportionate several liability:

> [S]evera̅l liability shifts the burden of insolvency from defendants to plaintiffs and creates a symmetrical unfairness to that existing with pure joint and several liability when a plaintiff is also comparatively responsible for damages. Indeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some [being non-negligent] are not comparatively responsible for their damages.

Restatement Third § 11 cmt. a at 109; *see id.* § C21 cmt. a, reporters' note at 214-15 ("[E]ven with the plaintiff sharing some fault, each defendant (as well as the plaintiff) is still a legal cause of all of the plaintiff's damages. Shifting the entire risk of insolvency to the plaintiff 'merely transform[s] the inequity of imposing that risk entirely on solvent defendants into the equal and opposite inequity of imposing the risk entirely on the plaintiff.'") (citation omitted); *id.* § A19 cmt. e, reporters' note at 167; *id.* § B18 cmt. a; *id.* § B19 cmt. d (describing effects of several liability on plaintiffs as "harsh").

As the *Restatement Third* indicates, there is absolutely no justification for treating the contributorily negligent plaintiff worse than the defendants who tortiously injured him, and there is worse than no justification for treating a non-negligent plaintiff worse than the defendants who tortiously injured him. Yet this is the result that is reached under pure proportionate several liability, according to which the share of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors is placed

entirely on the plaintiff, even if the plaintiff was not negligent, which is an unjustified disparate treatment under the comparative responsibility principle.

Moreover, it is not only the risk of tortfeasors' insolvency that is shifted entirely onto plaintiffs, even if they were not contributorily negligent, but also the substantial burden and costs of identifying, suing, and recovering their comparative responsibility shares from each tortfeasor. *Cf. Restatement Third* § 10 cmt. b, reporters' note at 105, § A18 cmt. a.

While making no formal endorsement, the *Restatement Third* states that its Track C, which consists of joint and several liability with reallocation of uncollectible shares among all the available responsible parties, including the plaintiff if the plaintiff was contributorily negligent, is the fairest approach:

> The allocation of the risk of insolvency adopted in this "C" Track is the fairest means of handling this problem. Reallocation may have some administrative costs and can create incursions on finality and administrative efficiency. Nevertheless, if handled expeditiously and with the flexibility reflected in Comment *h*, the administrative inconvenience of this reallocation system should be manageable.

Id. § C21 cmt. a; *see id.* § 17 cmt. a at 148.

This joint – and – several – liability – with - reallocation approach was the approach adopted by the Uniform Commissioners of State Laws in the Uniform Comparative Fault Act. Unif. Comp. Fault Act § 2, 12 U.L.A. 39 (West Supp. 1990). Sections 5 and 6 of the current draft of the Uniform Apportionment of Tort Responsibility Act provide for proportionate several liability with reallocation, which, however, is much less desirable than the reallocation scheme in the *Restatement Third* and the Uniform Comparative Fault Act, which use joint and several liability rather than

proportionate several liability as the foundation for subsequent reallocation.

Under modified joint and several liability, the plaintiff can initially recover the full amount of his claim (after reduction by his percentage of comparative responsibility if he was contributorily negligent) from any available and solvent tortfeasor, subject to possible partial escrow pending possible subsequent reallocation. The tortfeasor who compensated the plaintiff then bears the expense of locating the other tortfeasors, preparing and proving contribution claims against them, and collecting on those claims. Conversely, under modified proportionate several liability, the plaintiff must bear the expense of locating each tortfeasor, preparing and proving liability claims against each of them, collecting each tortfeasor's initial proportionate several liability share, and then coming back to each (hopefully still) available and solvent tortfeasor to collect her share of any uncollectible shares. Generally, the injured plaintiff, rather than the available solvent defendant, can much less afford the significant expense and delay involved in this process. *Cf.* 4 Harper et al. § 22.17, at 413 (defendants are more likely to be insured).

Moreover, the modified joint and several liability rule has the advantage of being able to be applied across the board, in situations involving innocent plaintiffs as well as contributorily negligent plaintiffs, whereas the modified proportionate several liability rule has not the slightest bit of justification in situations involving innocent plaintiffs. No doubt for these sorts of reasons, the modified joint and several liability rule was incorporated, after extensive and careful deliberation, in the Uniform Comparative Fault Act and, as the *Restatement Third* notes, has been widely endorsed. *See Restatement Third* § C21 cmt. a, reporters' note at 214-16.

The *Restatement Third* notes serious problems with the various hybrid schemes that have been adopted by various

states, including the "California" scheme that is suggested by petitioner's amici curiae. Regarding the threshold approach, which releases a defendant from joint and several liability if her percentage of comparative responsibility is less than a certain percentage, the *Restatement Third* states:

> [A]ny threshold is an imperfect way to screen out tangential tortfeasors, and often the threshold is set too high (50 percent) to serve this function well. When there are many tortfeasors, this Track does not perform well, as it virtually guarantees that several liability will be imposed, regardless of the role of any given tortfeasor in the plaintiff's injuries. This threshold series also imposes the risk of insolvency on an entirely innocent plaintiff whenever all solvent defendants are below the specified threshold. To the extent that the justification for modifying joint and several liability is the adoption of comparative responsibility so that the plaintiff may also be legally culpable, imposing the risk of insolvency on an innocent plaintiff is unwarranted.

Restatement Third § 17 cmt. a at 148-49; *see id.* § D18 cmt. c (noting additional problems).

Regarding the "California" approach, which employs joint and several liability for economic damages and proportionate several liability for noneconomic damages, the *Restatement Third* states:

> Some critics contend that this Track works an injustice to those who are not wage earners and thereby suffer a greater proportion of noneconomic damages in a lawsuit. Others, including those that focus on deterrence, would also dispute the proposition that noneconomic damages are less important than economic damages. This Track also treats unfairly the plaintiff who is not comparatively responsible for the injury by imposing the risk of insolvency for noneconomic loss on the innocent plaintiff rather than the culpable defendants. Finally, this track creates some administrative and practical difficulties in its operation.

Id. § 17 cmt. a at 149; *see id.* § E18 cmt. d & reporters' note at 252 (noting additional problems).

CONCLUSION

The Court should reaffirm the longstanding use of joint and several liability as part of FELA's comparative-responsibility regime.

Respectfully submitted.

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August 19, 2002

APPENDIX

No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF AMERICAN LAW PROFESSORS IN SUPPORT OF RESPONDENTS

For the convenience of the court and for purposes of identification, brief biographical sketches of *amici curiae* follow.

Richard L. Abel, University of California at Los Angeles. Richard L. Abel is Connell Professor of Law at UCLA, where he has taught torts since 1974. He has also taught at Yale

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George W. Conk, Fordham Law School. George W. Conk has taught torts, product liability, and scientific evidence as a visiting or adjunct professor at Fordham Law School and Seton Hall Law School since 1995. He continues to practice law and has been the managing partner of Tulipan & Conk, P.C., a tort claims firm, since 1979. He is an elected member of the American Law Institute and has written several articles regarding products liability, the Restatement (Third) of Torts, and proving causation.

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Joseph A. Page, Georgetown University Law Center. Joseph A. Page has taught torts for 38 years and products liability for more than 20 years. His articles and book reviews on the subjects of products liability and worker and consumer safety have appeared in numerous academic publications. His most recent scholarly project in the field of products liability is an article entitled *A Voice of Reason: The Products Liability Scholarship of Gary T. Schwartz*, and published in the South Carolina Law Review. He is currently at work on a monograph on the subject of proximate cause in tort law. Professor Page also teaches food and drug law, communicative torts (defamation and invasion of privacy) and legal process. He is also a member of the American Law Institute.

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Andrew F. Popper, American University, Washington College of Law. Andrew F. Popper is a Professor of Law and served for seven years as Associate Dean at Washington College of Law. Over the last 20 years Professor Popper has taught torts, product liability, administrative law, and antitrust law. He is the 1996 recipient of the ABA Robert B. McKay Award for excellence in Tort law. He has chaired the Administrative Law Section of the FBA. He is the author of more than 100 published articles, papers, and public documents. Professor Popper has served as a consumer rights advocate and pro bono counsel for the Consumers Union of America. He has testified as an expert witness before various Congressional committees more than 20 times on tort reform bills as well as filing four *amicus curiae* briefs before the United States Supreme Court.

Paul Rothstein, Georgetown University Law Center. Paul F. Rothstein has taught torts and advanced evidence for more than twenty years. Prior to teaching he was a litigation attorney, handling tort and similar cases. He has been active in continuing legal and judicial education, structuring and teaching programs for, among others, the Federal Judicial Center and U.S. Department of Justice. He has been a consultant or special counsel to the National Academy of Sciences, National Conference of Commissioners on Uniform States Laws, and several subcommittees of the Judiciary Committees of the U.S. Congress, and the Rand Institute for Civil Justice, as well as the Ministry of Justice of Canada. He has chaired and served on committees of the ABA, FBA, and Association of American Law Schools, and has served on a special panel of the National Research Counsel. Professor Rothstein co-authored a brief on behalf of the National Association of Manufacturers, Business Roundtable, Chemical

Manufacturers' Association, and other similar large national business organizations in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). He also co-authored a brief on behalf of the FBA representing federal government lawyers, in the leading attorney-client privilege case of *Upjohn Co. v. United States* (1981).

Michael L. Rustad, Suffolk University Law School. Michael L. Rustad, Ph.D., J.D., LL.M is the Thomas F. Lambert Jr. Professor of Law and Director of the Intellectual Property Law Program at Suffolk University. He has conducted and published nationwide empirical studies of tort remedies. His most recent books include *In Defense of Tort Law* (NYU Press 2002). Professor Rustad is a member of the American Law Institute.

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No. 01-963

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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation designed to obtain justice for the victims of corporate and government abuses.[1] Litigating in federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

TLPJ has a particular interest in this case because of the vital role the Federal Employers Liability Act ("FELA") plays in compensating workers for their injuries and discouraging employers from using dangerous products and practices. As this Court's precedents make clear, FELA jurisprudence is supposed to be guided by the common law. Attempting to limit their liability, however, Petitioner and its amici in this case disregard important common-law precedents. The rule of law they advance is at odds with the common law and, if adopted, would undercut FELA's central injury prevention and compensation goals. We submit this brief to present a more complete and accurate history of the common law, specifically the common law's longstanding recognition of mental anguish damages for fear of cancer in cases involving physical injury.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

With respect to mental anguish damages, Petitioner's argument focuses on the exception and ignores the rule. While Petitioner and its amici are correct that the common law has carved out various exceptions to permit the recovery of mental anguish damages in the absence of bodily injury, the exceptions have no bearing on this case. This case falls squarely within the traditional common-law rule: in a case involving bodily injury, a plaintiff is entitled to recover all physical and mental damages, including mental anguish caused by the fear of future harm arising from the defendant's conduct. Such damages, including fear of cancer damages, have been recognized by courts throughout the country for decades. Petitioner simply ignores this case law and urges the Court to discard the common-law rule in FELA cases. There is no sound justification, in law, logic, or policy, for such a drastic step.

ARGUMENT

I. THE COMMON LAW HAS TRADITIONALLY AWARDED DAMAGES FOR ALL MENTAL ANGUISH ACCOMPANYING A BODILY INJURY AND HAS SPECIFICALLY RECOGNIZED "FEAR OF CANCER" DAMAGES FOR NEARLY A CENTURY.

Petitioner asserts that the common law permits recovery for emotional distress only when the plaintiff shows "physical manifestations of severe emotional injury." Pet. Br. 17. In reality, the "physical manifestations" requirement does not apply in cases in which the defendant's tortious conduct caused bodily injury to the plaintiff. To the contrary, the common law has readily awarded compensation for all mental anguish connected with a bodily injury, including fear of future cancer.

The common law long denied recovery for mental pain or anxiety "when the unlawful act causes that alone" but has always recognized that "where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." W. PROSSER & W. KEETON, THE LAW OF TORTS, § 12, at 55 & n.3 (5th ed. 1984) (quoting *Lynch v. Knight*, 1861, 9 H.L.C. 577, 598, 11 Eng. Rep. 854). In cases involving bodily injuries, "courts have not been reluctant to allow recovery for emotional distress, occurring contemporaneously with those personal injuries, as an additional element of damages. In these cases, recovery for emotional distress was allowed as a claim 'parasitic' to the 'host' claim of damages for negligently inflicted physical injuries." *Payton v. Abbott Labs*, 437 N.E.2d 171, 176 (Mass. 1982) (citations omitted); *see also* PROSSER & KEETON, *supra*, § 54, at 362-63 (5th ed. 1984) ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.").

As a logical component of these "parasitic" damages, courts have allowed juries to consider the plaintiff's present fear and anxiety about future harm stemming from the defendant's negligence. In *Southern Kansas Railway Co. of Texas v. McSwain*, 118 S.W. 874 (Tex. Civ. App. 1909), a railroad employee whose foot was crushed in an accident was allowed to testify "that he suffered mental anguish by reason, among other things, of 'the fear that blood poison might set up and prove fatal.'" *Id.* at 875 (citing *M., K. & T. Ry. Co. of Tex. v. Miller*, 61 S.W. 978 (Tex. Civ. App. 1901)). In *Butts v. National Exch. Bank*, 72 S.W. 1083 (Mo. App. 1903), the court held that a plaintiff whose foot was pierced by sharp object "should have been permitted to show as an element of damage that he was in reasonable apprehension of blood poisoning as the possible, if not probable, consequence of his injury. Mental suffering, when a condition of mind produced by physical injury and attending it, is as proper an element of the damage

plaintiff." *Id.* at 1050. New York's highest court approved such damages in *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958). In *Ferrara*, the plaintiff received burns from an X-ray and was "referred by her attorney to a dermatologist," who "advised the plaintiff to have her shoulder checked every six months inasmuch as the area of the burn might become cancerous." *Id.* at 251-52. The court upheld the plaintiff's recovery of damages, holding that "[i]t is entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer." *Id.* at 253. In *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351, 354 (La. 1974), the Louisiana Supreme Court upheld fear of cancer damages for a worker who received radiation burns, observing that the accident left him with "a disabled and sometimes painful hand to remind him of his fear." *Id.* at 354.

As the health hazards of asbestos came to light, courts applied these firmly established common-law principles in asbestos cases. Courts in Delaware, Florida, Iowa, Louisiana, New Jersey, Ohio, and Washington have affirmed the right of plaintiffs with asbestosis to seek damages for mental anguish from their fear of cancer. The principles underlying the earlier fear of cancer cases proved even more appropriate in cases involving asbestosis, in which the plaintiff's physical injury establishes sustained and substantial exposure to a potent carcinogen.

In *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. Dist. Ct. App. 1985), the court considered damages for fear of cancer in the asbestos context. Citing *Alley*, *supra*, the court recognized that claims for fear of cancer "have long been permitted." *Id.* at 527. Balancing the relevant policy considerations, the court concluded that only plaintiffs with an existing physical injury, such as asbestosis, should be permitted to seek such damages:

> Imposing a requirement that there be a physical injury as a predicate to recovery for mental distress arising from a fear of cancer is not an arbitrary act. First, although asbestosis and cancer are not medically linked in that asbestosis does not cause cancer, the fact that a plaintiff has asbestosis may increase the chances that he will contract cancer. As such, the physical injury requirement for a mental distress from fear of cancer claim is linked to the merits of the claim, since plaintiffs with asbestosis may have a well-founded greater reason to fear contracting cancer than those who do not have asbestosis. In short, the physical injury requirement will insure that the claims permitted are only the most genuine.

Id. at 529 (citations omitted). Even if the plaintiff never actually develops cancer, "his present asbestosis certainly provide[s] him with a chronic, painful and concrete reminder that he has been injuriously exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear." *Id.*

In *Devlin v. Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985), the court held that plaintiffs with existing asbestos-related injuries were entitled to compensation for fear of cancer, which "stems from the substantial bodily harm they have already suffered as a result of ingesting asbestos over an extended period of time." *Id.* at 499. Citing *Devlin*, the Third Circuit predicted that the New Jersey Supreme Court would reach the same result in *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986). The New Jersey Supreme Court validated that prediction, holding that a "claim for emotional-distress damages based on a reasonable fear of future disease" is "clearly cognizable where, as here, plaintiff's exposure to asbestos has resulted in physical injury." *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257, 263 (N.J. 1989).

In *Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993), the Sixth Circuit approved the admission of evidence relating to the increased risk of cancer and an instruction "that the jury may award, as an element of compensatory or actual damages, damages proved for emotional distress suffered as a result of demonstrated fear of developing an asbestos-related cancer. ... The question of whether plaintiffs' apprehensions of developing cancer are reasonable is for you the jury to determine. The probability of plaintiffs developing cancer is but one factor to be considered in making this determination." *Id.* at 1012 (ellipses in original). The Sixth Circuit relied on an earlier decision, *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. Com. Pl. 1987), in which the court held that fear of cancer is compensable when "an asbestosis-afflicted plaintiff is aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself in mental distress." *Id.* at 481. The reasonableness of the plaintiff's fear "is not equivalent to probability or certainty but is for a fact-finder to determine." *Id.*

The year after *Lavelle* was decided, a Washington court held that a plaintiff with an existing asbestos-related injury was entitled to recover "for his reasonable fear of contracting cancer as an element of his damages." *Sorenson v. Raymark Industries, Inc.*, 756 P.2d 740, 742 (Wash. Ct. App. 1988). Applying Louisiana law, the Fifth Circuit held that a plaintiff with an asbestos-related injury could recover damages for fear of future illness even though "the plaintiff may not presently suffer from the feared condition at the time he or she is seeking damages or does not ever develop the condition in the future. ... [T]he compensable injury is not the feared condition; instead, the compensable injury is the mental anxiety resulting from fear of developing that condition which the plaintiff endures on a daily basis." *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 858 (5th Cir. 1988). Courts in Delaware drew the same distinction, barring claims for increased risk of cancer while allowing

plaintiffs with asbestosis to seek damages for "their present fear of getting cancer." *Farrall v. A.C. & S. Co., Inc.*, 558 A.2d 1078, 1080 (Del. Super. Ct. 1989); *see also Celotex Corp. v. Wilson*, 607 A.2d 1223, 1230 (Del. Super. Ct. 1992).

More recently, the Iowa Supreme Court adopted this prevailing view in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993). The court explained that such a claim "is for the present fear of cancer, not for a future loss resulting from cancer. . . . Beeman's fear is happening now; it is not contingent upon developing cancer. Whether Beeman will probably develop cancer is thus irrelevant to proving his present, concrete fear of developing cancer." *Id.* at 252.

These cases demonstrate a broad consensus in both results and reasoning, and they cast doubt on the assertion that state and federal courts are in a state of "considerable confusion" on this issue. United States Br. 17 n.5. As demonstrated above, the majority of state and federal courts considering the issue have held that plaintiffs with asbestosis may seek damages for their fear of cancer. The handful of contrary cases cited by the United States represents, to put it mildly, a minority view. In fact, the Pennsylvania Supreme Court is the only state court in the nation to hold that plaintiffs with asbestosis cannot seek damages for fear of cancer. *See Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996). Contrary to the United States' characterization, Delaware does allow plaintiffs who have asbestosis to seek damages for "their present fear of getting cancer." *Farrall v. A.C. & S. Co., Inc.*, 558 A.2d 1078, 1080 (Del. Super. Ct. 1989); *see also Celotex Corp. v. Wilson*, 607 A.2d 1223, 1230 (Del. Super. Ct. 1992). The case cited by the United States, *Nutt v. A.C. & S., Inc.*, 466 A.2d 18 (Del. Super. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984), involved claims for mental distress by the spouses of plaintiffs with asbestosis. The spouses "concede[d] that they have suffered no physical injury due to wrongful asbestos exposure,"

and that concession was "dispositive of this case." *Mergenthaler*, 480 A. 2d at 651 (distinguishing cases in which plaintiffs "had suffered an underlying injury").

As *Mergenthaler* indicates, the common law is capable of screening out claimants who do not have actual injuries. In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the Kentucky Supreme Court held that plaintiffs who had no physical injury could not recover for "the potential consequences of a negligent act where no harmful change was yet made manifest." *Id.* at 193. Citing the *Eagle-Picher* case, the court reasoned that a plaintiff with asbestosis would have a viable claim for mental anguish damages but that "until such time as the plaintiff can prove some harmful result from the exposure, **albeit he need not prove he is already suffering from cancer**, his cause of action has yet to accrue." *Id.* at 194-95 (emphasis added); *see also Wolff v. A-One Oil, Inc.*, 627 N.Y.S.2d 788, 789-90 (N.Y. App. Div. 1995) ("Under the prevailing case law, in order to maintain a cause of action for 'fear of [developing] cancer' following exposure to a toxic substance like asbestos, a plaintiff must establish . . . the clinically demonstrable presence of asbestos fibers in the plaintiff's body, or some indication of asbestos-induced disease.").

The cases underscore the ability to screen out trivial or invalid claims without sacrificing the rights of injured parties. The requirement that plaintiffs show a physical injury was designed to assist this screening process. *See, e.g., Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 818 (Cal. 1980) ("The primary justification for the requirement of physical injury appears to be that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims."); *Orlo v. Connecticut Co.*, 21 A.2d 402, 405 (Conn. 1941) ("The real basis for the requirement that there shall be a contemporaneous bodily injury or battery, is that this guarantees the reality of the damage claimed."); *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) (explaining the "corroborating

purpose" of the physical injury requirement); *Homans v. Boston Elevated Ry. Co.*, 62 N.E. 737, 737 (Mass. 1902) ("[W]hen the reality of the cause is guarantied by proof of a substantial battery of the person there is no occasion to press further the exception to general rules."); *see also* PROSSER & KEETON, *supra*, § 54, at 362-63 (5th ed. 1984) ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.").

Petitioner's insistence that plaintiffs with asbestosis must show a "physical manifestation of fear" is simply incorrect. This requirement has never been applied to cases in which the plaintiff alleges an existing physical injury caused by the defendant's conduct. *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79, 85 (3d Cir. 1986) (applying New Jersey law); *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257, 263 (N.J. 1989) ("[P]roof that emotional distress has resulted in 'substantial bodily injury or sickness' is not required when plaintiff suffers from a present physical disease attributable to defendant's tortious conduct.") (quoting *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 499 (N.J. Super. Ct. Law Div. 1985)); *see also City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) (citing *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex.1995), and *Brown v. Sullivan*, 10 S.W. 288, 290 (Tex. 1888)). The cases cited by Petitioner to support the "physical manifestation" requirement involve claims of purely emotional distress, unconnected with any physical injury.

Petitioner's reliance on the "bystander" cases is equally misplaced. The analysis in the bystander cases is "inapt in the context of claims for injuries from exposure to toxic substances. The analysis to determine whether bystanders should recover damages for mental anguish caused by viewing accidents involving third parties is inappropriate in the toxic tort context because the victim is not a bystander – his mental anguish results from physical involvement in the principal tortious act." J. Joseph Reina, *Recovery for Fear of Cancer and Increased*

Risk of Cancer: Problems with Gideon *and a Proposed Solution*, 7 REV. LITIG. 39, 49 (1987). Based on its flawed analogy with the bystander cases, Petitioner concludes that the common law does not permit "knowledge-based claims." *See* Petitioner's Brief at 21-22 & n. 15. The common law has in fact long compensated mental anguish based on a plaintiff's knowledge of his or her own potential for future disease. In *Ferrara v. Galluchio*, *supra*, the plaintiff who received X-ray burns was told of her increased risk of cancer by her doctor, who "advised the plaintiff to have her shoulder checked every six months inasmuch as the area of the burn might become cancerous." *Id.* at 251-52. As discussed above, the court found it "entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer." *Id.* at 253; *see also Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964) ("Disclosure by a physician that a wound 'might' develop into cancer is a reasonable basis for a patient to have anxiety about the possibility of developing cancer, and is recoverable in damages."); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 498 (N.J. Super. Ct. Law Div. 1985) (holding that plaintiffs with asbestosis had reasonable fear of cancer and noting that "[p]laintiffs have been told by their doctors of the increased risk and the need for medical surveillance to monitor for potential cancerous developments."). Whether a plaintiff had taken reasonable steps "to control his apprehension" can be considered "on the principle of mitigation of damages." *Smith v. Boston & M.R.R.*, 177 A. 729, 738 (N.H. 1937).

II. THE COURT'S FELA DECISIONS AUTHORIZE AWARDS BASED IN PART ON FEAR OF CANCER TO PERSONS WHO HAVE SUSTAINED NONMALIGNANT PHYSICAL INJURY.

In keeping with the common law, this Court's FELA jurisprudence has acknowledged that plaintiffs with a physical injury may seek damages for accompanying mental anguish. Petitioner accuses the courts below of "turning a blind eye to this Court's FELA jurisprudence" in permitting workers with nonmalignant asbestos-related diseases to recover damages for their fear of contracting an asbestos-related cancer, Pet. Br. 15, and several amici argue flatly that "*Buckley* [*v. Metro-North R.R. Co.*, 521 U.S. 424 (1997)] precludes an award for 'fear of cancer' as recovery for emotional distress under FELA." American Insurance Association ("AIA") Br. 7; *see also* United States Br. 14 ("the language and logic of *Buckley* clearly preclude" the recovery in this case). But if anything, the language in *Buckley* supports the trial court's instruction allowing the jury to consider the plaintiffs' fear of contracting an asbestos-related cancer in awarding emotional distress damages.

In *Buckley*, the Court held that a plaintiff who had merely been exposed to asbestos could not recover damages for his fear of contracting an asbestos-related cancer. But the Court expressly distinguished cases in which plaintiffs with asbestosis recovered damages for fear of cancer. *Id.* at 432, 437. Moreover, the Court recognized broadly that "the common law permits emotional distress recovery for that category of plaintiffs who suffer from disease (or exhibit a physical symptom)," based perhaps on its "desire to make a physically injured victim whole or because the parties are likely to be in court in any event." 521 U.S. at 436-37. Its recognition of these policy interests underlying the common law rule indicates that the Court fully understood that the common law permits

recovery of damages for fear of a *different injury* than that which brought the plaintiff into court. And although the only anguish of plaintiff Buckley described in the opinion was his fear of contracting cancer, the Court pointedly held that Buckley could not recover for his emotional distress "unless, and until, he manifests symptoms of *a disease*." *Id.* at 427 (emphasis added). The Court could easily have articulated the "no recovery for fear of cancer without proof of cancer" rule sought by Petitioner, but it did not. The assertion that the language of *Buckley* prohibits the trial court's restrained and qualified instruction permitting an award for fear of cancer – an instruction entirely consistent with the holdings of the overwhelming majority of courts that have considered the precise issue – is wildly overstated.

The American Insurance Association and Association of American Railroads downplay the significance of the proof in this case that each of the plaintiffs has a clinically significant asbestos-related injury, pointing out that "this case differs from *Buckley* only in that plaintiffs have produced evidence that they have asbestosis." AIA Br. 4; *see also* Association of American Railroads ("AAR") Br. 5 (the "alleged fears" of plaintiffs here "are no less based on speculation than those of asymptomatic plaintiffs like Buckley"). But in *Buckley*, both these organizations filed amicus curiae briefs citing the absence of disease in the plaintiff as a critical fact distinguishing the case from other cases in which the courts permitted recovery of damages for fear of cancer. Brief of Amicus Curiae American Insurance Association in *Buckley v. Metro-North Railroad Co.*, 521 U.S. 424 (1997) (No. 96-320), at 13 & n.5 (pointing out that "courts have required, at a minimum, a showing that the plaintiff suffers asbestosis before permitting a recovery for fear of cancer," and that "the courts have not equated the physical injury requirement with physical impact, but have required a physical injury sufficient to bring an independent tort"); Brief of Amicus Curiae Association of American Railroads in *Buckley v. Metro-North Railroad Co.*, 521 U.S. 424 (1997)

(No 96-320), at 9 (stating that two cases permitting recovery for fear of cancer are "clearly distinguishable because the plaintiff suffered a physical injury"). The amici in *Buckley* assured the Court that "if respondent does, in fact, suffer a physical injury from his exposure to asbestos, he will be able to bring a cause of action to recover not only for his physical injuries, but also for *any* emotional injury. In that event, he will be compensated for *all his injuries arising from his exposure*." AIA Br. in *Buckley* at 14 (emphasis added); see also Brief of Amicus Curiae Washington Legal Foundation ("WLF") in *Buckley v. Metro-North Railroad Co.*, 521 U.S. 424 (1997) (No. 96-320), at 9 ("if Mr. Buckley, in fact, suffers a *physical impairment* as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and the accompanying, if any, emotional distress.") (emphasis added).

Contrary to the implications of Petitioner and its amici, nothing in the Court's FELA decisions prior to *Buckley* suggests that the Court would depart from the common law consensus permitting damages for fear of future injury caused by tortious conduct that caused a physical injury. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Court limited recovery for negligently inflicted emotional distress to persons who were in the "zone of danger" caused by the defendant's tortious conduct, but was careful to clarify that its analysis did not apply to claims of emotional distress which accompanied physical injuries, which has long been permitted: "The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another *and that is not directly brought about by a physical injury*." *Id.* at 544 (emphasis added). In *Gottshall*, neither of the plaintiffs had suffered any physical injury or arguable impact as a result of the tortious conduct. In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987), the Court did not reach the issue of the scope of compensation available for emotional distress under FELA. Nothing in the Court's opinion, however, casts doubt on the observation of the lower

court that "damages for emotional distress *accompanying physical injuries* are recoverable in traditional FELA actions." *Buell v. Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320, 1324 (9th Cir. 1985) (emphasis added), citing *Erie R. Co. v. Collins*, 253 U.S. 77, 87 (1920) and *Bullard v. Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir.1977).

The trial court's instruction in this case permitting plaintiffs to recover damages for fear of cancer associated with their asbestos-related injuries is fully consistent not only with the common law as described by the commentators and the state and federal courts, but also with the Court's language in *Buckley* and with its prior FELA jurisprudence. It is Petitioner and its amici, not Respondents, who seek a departure from precedent.

III. DEPARTING FROM THE COMMON-LAW RECOGNITION OF FEAR OF CANCER DAMAGES WOULD DO NOTHING TO AMELIORATE THE ALLEGED PROBLEMS IN ASBESTOS LITIGATION.

Petitioner and its amici air numerous concerns about the state of asbestos litigation, but there is no indication that Petitioner's proposed departure from common-law rules would address those underlying problems in any meaningful way. Citing newspaper and magazine articles, Petitioner warns that "[c]laims of the truly sick" have been supplanted by "minimally impaired individuals." Pet. Br. 5. The Association of American Railroads argues that asbestos lawsuits have "exploded, resulting in widespread bankruptcies. Allowing recovery for fear of cancer no doubt contributed to this disaster." AAR Br. 9. The United States warns that "'fear of cancer' liability unfettered from actual instances of cancer would present the problem of 'unlimited and unpredictable liability'" and produce a "flood of relatively trivial claims." United States Br. 18-19.

Assuming, for the sake of argument, that this bleak assessment of asbestos litigation is completely true, prohibiting damages for fear of cancer does virtually nothing to make the potential liability any more definite or reduce the number of claims filed. All of the parties acknowledge that plaintiffs with asbestosis are still entitled to file claims and may still recover damages, including damages for past and future mental anguish. Indeed, one of the reasons that the common law has always permitted mental anguish damages in cases involving bodily injury is that "the parties are likely to be in court in any event." *Buckley*, 521 U.S. at 436-37. Even if asbestos litigation truly is a "flood," Petitioner's proposed abandonment of the common law would not leave the courts any drier.

Nor would the elimination of fear of cancer damages bring predictability or certainty to asbestos litigation. Claims of asbestosis necessarily involve the assessment of past and future damages for physical pain and mental anguish. None of these elements of damages lend themselves to precise measurement. *See Jones v. United R.R. of San Francisco*, 202 P. 919, 923 (Cal. Ct. App 1921) ("Mental suffering, like physical suffering, is incapable of exact measurement in dollars and cents, but the jury, nevertheless, may place its estimate upon it."); *Smith v. Boston & M.R.R.*, 177 A. 729, 738 (N.H. 1937) ("Complaints of mental pain, when in issue, stand on the same ground as complaints of physical pain when that is in issue.").

Petitioner's quarrel is not with the uncertainty of asbestos litigation but with the uncertainty inherent in a jury system. Petitioner argues that FELA should not be interpreted to "grant juries free rein to make inherently subjective awards of damages for emotional distress" based on "manipulable" diagnoses of asbestosis and on the "claimed emotional reaction of the plaintiff." Pet. Br. 24; *see also* WLF Br. 6 (complaining that our justice system extends "the promise of easy and generous recovery for claimed emotional distress."). But the Framers fully intended to give civil juries "free rein" to make

damage awards, *especially* in cases in which the damage alleged is unliquidated, subjective, or uncertain. As the Court recently noted, "the common law rule as it existed at the time of the adoption of the Constitution was that in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (internal quotations marks and citations omitted). More than 80 years ago, the Court rejected a challenge to an emotional distress award in an FELA case similar to that urged here:

> It is asserted against the verdict that it is 'outrageously excessive,' caused by the instruction of the court that plaintiff could recover 'for shame and humiliation.' Counsel's argument is not easy to represent or estimate. They say that 'mental pain' of the designated character, 'the suffering from feelings, is intangible, incapable of test or trial,' might vary in individuals, 'rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal.' *If all that be granted, it was for the consideration of the jury.*

Erie R. Co. v. Collins, 253 U.S. 77, 85 (1920), *overruled on other grounds, Chicago & E.I.R. Co. v. Industrial Comm'n of Illinois*, 284 U.S. 296 (1932) (emphasis added); *see also Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 115 (1963) (reaffirming that in a FELA case "[i]t is the jury, not the court, which is the fact-finding body. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely

because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.") (citations omitted).

Petitioner describes the fact that the jury must weigh conflicting expert testimony as a "surreal situation." Pet. Br. 6. What Petitioner calls a "surreal situation" is simply the operation of the adversarial process. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 124 (1979) ("[D]etermining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony."). As this Court has explained, the assumption that "befuddled juries" will be "confounded" by expert testimony is "overly pessimistic about the capabilities of the jury and of the adversary system generally." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993).

This Court has recognized that asbestos litigation presents serious problems and urged Congress to enact a comprehensive system for resolving asbestos claims. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997). At the same time, this Court has acknowledged that solutions to the asbestos problem cannot simply be read into existing rules and statutes. *Id.* at 629 ("Rule 23 . . . cannot carry the large load . . . heaped upon it."). Nor should the Court make arbitrary changes in the common law in order to strike a symbolic blow at the perceived shortcomings of asbestos litigation.

CONCLUSION

Petitioner's interpretation of FELA requires the Court to abandon the common law's longstanding recognition of damages for fear of cancer and repudiate the consensus of state and federal courts in asbestos cases. This abrupt departure from precedent would yield no appreciable gain in efficiency or fairness. In the absence of any compelling reason, the Court

should not overturn the well-established case law on parastic mental anguish damages in general, and fear of cancer damages in particular.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF *AMICUS CURIAE* OF THE AMERICAN PUBLIC HEALTH ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae American Public Health Association (APHA), founded in 1872, is the oldest and largest public health organization in the world, representing over 50,000 public health professionals. It represents over 50 occupations from all disciplines and specialties in public health. Since 1911, APHA has published the *American Journal of Public Health,* dedicated to original work in research, research methods, and program evaluation in the field of public health. APHA strives to improve public health by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Because APHA is devoted to the promotion and protection of personal, occupational and environmental health, it is directly concerned with issues of public and occupational health, including the health effects of asbestos exposure. APHA is committed to the dissemination of accurate scientific and medical data for use in developing health-related public policy, and APHA submits this brief in order to assist this Court in performing its function with a balanced and accurate understanding of available information concerning asbestos-related disease.[1]

SUMMARY OF ARGUMENT

In addressing the issue whether damages for fear of cancer should be available to plaintiffs who prove that they suffer from

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[1]The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

asbestosis, petitioner and its amici make numerous characterizations about the nature and significance of asbestosis and what is known about the relationship between asbestosis, lung cancer and smoking. For the most part, these characterizations do not reflect accepted scientific or medical knowledge. Because the judgment below should not be reversed based on a misunderstanding of the medical facts involved, Amicus Curiae APHA offers this brief to provide the Court with information about the medical and scientific evidence concerning asbestosis and cancer, which may help to inform the Court's determination. Despite the suggestions of petitioner and its amici, these facts are not controversial assertions with scant support. They represent a substantial body of data demonstrating that asbestosis is a severe and debilitating disease and that those who suffer from it experience a substantially increased risk of developing cancers likewise caused by their exposure to asbestos.

Underlying much of the argument of petitioner and its amici is the suggestion that asbestosis is a pretextual injury. In fact, asbestosis is a clinically significant, potentially disabling, progressive fibrosis of the lungs. Characterized by the gradual onset of dyspnea (or shortness of breath), its symptoms may also include chest pain, weight loss, coughing, and fatigue. Asbestosis can compromise the immune and cardiovascular systems as well as the respiratory system and will sometimes result in death.

Petitioner and its amici also argue that the elevated risk of asbestos-related cancer is too speculative, controversial and uncertain to support damages. But it is virtually beyond dispute that exposure to asbestos at levels sufficient to cause asbestosis also causes significant increased risks of lung cancer, pleural and peritoneal mesothelioma, and other cancers. Indeed, there is general agreement that the risk of asbestos-related lung cancer is greatest in persons diagnosed with asbestosis.

Petitioner and its amici further suggest that any increased

risk of cancer among asbestosis patients is primarily related to smoking rather than asbestos exposure. While tobacco smoking in the absence of asbestos exposure increases the risk of lung cancer as much as tenfold, an asbestos-exposed smoker faces fifty to sixty times the risk experienced by a non-smoker who was never exposed to asbestos, and a substantially greater risk than a smoker without asbestos exposure. Tobacco smoke and asbestos exposure have a synergistic effect, multiplying the risk of lung cancer, so that asbestos exposure significantly contributes to and increases the risk of lung cancer among smokers.

Finally, petitioner and its amici assert that fear of cancer among asbestosis patients is the result of information they have received from their doctors, and is thus somehow unreasonable or not genuinely attributable to their injurious exposure to asbestos. Management of asbestosis relies largely on patient education. Through such education, doctors can urge patients to avoid infection and stop smoking, which will decrease mortality from nonmalignant respiratory illness and the risk of lung cancer. Patients necessarily rely on their doctors for this type of information, and the apprehension of cancer that is the natural consequence of the provision of accurate information by doctors to patients cannot be disparaged as unreasonable or artificially induced.

ARGUMENT

I. ASBESTOSIS IS A CLINICALLY SERIOUS, OFTEN DISABLING, AND PROGRESSIVE SCARRING OF THE LUNGS.

Petitioner and its amici dismiss the significance of asbestosis as a significant physical injury, even calling it a pretextual injury. On the contrary, there is wide medical and scientific recognition that asbestosis is a clinically serious, often

disabling, and progressive disease.[2] Federal governmental research and regulatory agencies as well as major public health organizations such as the American Lung Association have consistently recognized that asbestosis is a disease of genuine severity.[3] Indeed, it is irreversible, progressive, and potentially

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[2]*See, e.g.*, Samuel P. Hammar & Ronald F. Dodson, *Asbestos, in* PULMONARY PATHOLOGY 901, 941 (David H. Dail & Samuel P. Hammar eds., 2d ed. 1994); SATTAR FARZAN, A CONCISE HANDBOOK OF RESPIRATORY DISEASES 208 (3d ed. 1992); MARVIN I. SCHWARTZ & TALMADGE E. KING, JR., INTERSTITIAL LUNG DISEASE 88 (1988); W. KEITH C. MORGAN & ANTHONY SEATON, OCCUPATIONAL LUNG DISEASES 333 (2d ed. 1984); ENCYCLOPAEDIA OF OCCUPATIONAL HEALTH AND SAFETY 188 (Luigi Parmeggiani ed., 3d ed. 1983); H. CORWIN HINSHAW & JOHN F. MURRAY, DISEASES OF THE CHEST 728 (4th ed. 1980); Leslie Michaels & Seymour S. Chissick, *Introduction, in* 1 ASBESTOS: PROPERTIES, APPLICATIONS AND HAZARDS 1, 9 (L. Michaels & S.S. Chissick eds., 1979).

[3]NATIONAL CANCER INSTITUTE, CANCER FACTS, ASBESTOS EXPOSURE: QUESTIONS & ANSWERS, http://cis.nci.nih.gov/fact/3_21.htm (asbestosis is "a chronic lung ailment that can produce shortness of breath, coughing, and permanent lung damage"); AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, CAS# 1332-21-4, PUBLIC HEALTH STATEMENT FOR ASBESTOS (2001), http://www.atsdr.cdc.gov/toxprofiles/phs61.html (asbestosis is "a serious disease and can eventually lead to disability and death"); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DHHS FACT SHEET: ASBESTOS (2001), http://www.hhs.gov/news/press/2001pres/20010916a.html (asbestosis "is a serious, progressive disease associated with long-term exposure to asbestos that causes damage (called 'scarring') to lung tissue"); U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNOLOGY TRANSFER NETWORK, AIR TOXICS WEBSITE, ASBESTOS 133-21-4, HAZARD SUMMARY, http://www.epa.gov/ttnatw01/hlthef/asbestos.html ("Asbestosis is characterized by shortness of breath and cough and may lead to severe impairment of respiratory function."); DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, SUMMARY AND EXPLANATION OF REVISED STANDARDS, 59 FR 40964, 40979 (1994) (asbestosis is a "disabling and often fatal fibrosis of the deep portions of the lung"); AMERICAN LUNG ASSOCIATION, FACT SHEET: OCCUPATIONAL LUNG DISEASE (2000), http://www.lungusa.org/diseases/occupational_factsheet.html ("Asbestosis

deadly.[4]

The essential feature of asbestosis as a disease is fibrosis or scarring of lung tissue by inhaled asbestos fibers.[5] Beginning insidiously, the pathological changes caused by asbestos exposure cannot be corrected[6] and generally continue to worsen as time passes: "asbestosis is an inexorably progressive disease in most cases once it has started."[7] Asbestos fibers, once

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is a progressive disease involving scarring of lung tissue as a result of exposure to the microscopic fibers of asbestos."). *See also* CANADIAN LUNG ASSOCIATION, ASBESTOSIS/DUST DISEASES (2002), http://www.lung.ca/diseases/asbestosis.html ("After the fibrosis becomes well established the worker develops increasing breathlessness often with cough, sputum and weight-loss.")

[4]Raymond Demers, Agency for Toxic Substances & Disease Registry, *Asbestos Toxicity, in* CASE STUDIES IN ENVIRONMENTAL MEDICINE 15 (Irving Selikoff ed., 1990).

[5]GORDON L. SNIDER, CLINICAL PULMONARY MEDICINE 289-90 (1981) ("Asbestosis is a form of chronic interstitial fibrosis produced by asbestos. ... Progression appears to be relentless, even after exposure has ceased."); Richard P. Stankus et al., *Hypersensitivity Lung Disease, in* 3 CURRENT PULMONOLOGY 61, 76 (Daniel H. Simmons ed., 1981) ("Asbestosis is a chronic, fibrosing, inorganic-dust pneumoconiosis. ... [which] may progress after cessation of exposure."); Roger Williams & P. Hugh-Jones, *The Significance of Lung Function Changes in Asbestosis,* THORAX 15:109-19, 109 (1960) (asbestosis is "a crippling form of pulmonary fibrosis").

[6]J. Bernard L. Gee & G.J. Walker Smith, *Cellular Mechanisms in Occupational Lung Disease, in* OCCUPATIONAL LUNG DISEASE 39, 51 (J. Bernard L. Gee et al. ed., Am. Coll. Chest Physicians 1984) ("Clinically, established lung fibrosis is irreversible.").

[7]G.K. Sluis-Cremer & Eva Hnizdo, *Progression of Irregular Opacities in Asbestos Miners,* BR. J. IND. MED. 46:846-52, 851 & 852 (1989) ("Our results indicate that once a dose of asbestos sufficient to initiate the disease has been retained in the lungs the disease is inexorably progressive."); Robert Barnes, *Progression of Radiographic Changes in*

inhaled, are drawn into the lung parenchyma and can remain embedded there for many years.[8] As asbestosis progresses, the lungs will shrink in volume, become increasingly firm and develop areas of cysts called honeycombing.[9] "With

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Asbestos Workers and Ex-Workers, J. SOC. OCCUP. MED. 36:9-12, 11 (1986) (documenting progression years after leaving employment and associated disability); Council on Scientific Affairs, *A Physician's Guide to Asbestos-Related Diseases*, J.A.M.A. 252:2593-97, 2594 & 2595 (1984); Suzanne A.H. James, *Asbestosis*, RADIOLOGY 37:81-85, 82 (1966) (asbestosis "is generally progressive even after removal from contact").

[8]Daniel E. Banks, *Asbestos-Related Diseases of the Lung*, WEST VIRGINIA MED. J. 76:163-68, 164 (1980); *Pneumoconiosis, in* SURGICAL PATHOLOGY OF NON-NEOPLASMIC LUNG DISEASE 85 (James L. Bennington ed., 13th ed. 1982) ("Interstitial fibrosis can progress even after exposure has ceased, a phenomenon related at least in part to the persistence of asbestos fibers in the lungs."); Irving J. Selikoff et al., *Asbestosis and Neoplasia*, AM. J. MED. 42(4):487-96, 488 (1967) ("The asbestos fibers remain *in situ* where inhaled, but the tissue response to them is indolent, albeit progressive and apparently irreversible.").

[9]Hammar & Dodson (1994), *supra*, at 941 ("As the fibrosis becomes more severe, there are streaks and foci of greyish-white fibrous tissue in the [lung tissue]... and honeycombing may occur."); ENCYCLOPAEDIA OF OCCUPATIONAL HEALTH AND SAFETY, *supra*, at 188 ("areas [of fibrosis] increase in size and coalesce causing diffuse interstitial fibrosis with shrinkage. The process starts in the bases spreading upward as the disease progresses; in advanced disease the whole lung structure is distorted and replaced by dense fibrosis, cysts, and some areas of emphysema."); John M. Dement et al., *Asbestosis, in* OCCUPATIONAL RESPIRATORY DISEASES 287, 307 & 317 (James A. Merchant ed., Dep't of Health & Human Serv. (NIOSH) Pub. 1986). *See also* Banks (1980), *supra*, at 165 (advanced cases may show "a diffusely fibrotic, shrunken lung"); *Pneumoconiosis* (1982), *supra*, at 87; J.S.P. Jones, *Asbestos-Related Diseases, Part 2: Pathology and Experimental Pathology of Asbestos Dust Exposure, in* 1 ASBESTOS: PROPERTIES, APPLICATIONS AND HAZARDS 409, 418 (L. Michaels & S.S. Chissick eds., 1979) ("when the severity of the disease is slight, the lungs will be of normal size, but the greater the amount of fibrosis, the greater will be the degree of lung shrinkage.").

progressive asbestosis, airspaces are obliterated."[10] Because the progressive fibrosis decreases the elasticity of the lungs, the patient is likely to experience a feeling of tightness in the chest.[11] The decreased lung volume will provoke a pattern of rapid, shallow breathing.[12] Eventually, the patient may suffer arterial oxygen desaturation and cyanosis.[13]

The most prominent symptom of asbestosis is dyspnea or shortness of breath. Dyspnea appears first on exertion and becomes increasingly severe over time, progressing to serious dyspnea when the patient is at rest.[14] Studies have shown that

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[10]Jerome Kleinerman, *Occupational Lung Diseases: Asbestos-, Talc-, and Beryllium-Related Respiratory Diseases, in* BAUM'S TEXTBOOK OF PULMONARY DISEASE 769, 772 (1994). *See also* John E. Craighead et al., *The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Schema*, ARCH. PATHOL. LAB. MED. 106:544-96, 570 (1982).

[11]Demers (1990), *supra*, at 11.

[12]Craighead et al. (1982), *supra*, at 575.

[13]Dement et al. (1986), *supra*, at 317; Craighead et al. (1982), *supra*, at 570 ("Hypoxemia develops when significant ventilation-perfusion discrepancies develop and gas exchange fails. Occasionally it is clinically manifested as cyanosis, initially on exercise, and in the later stages at rest.").

[14]Schwartz & King (1988), *supra*, at 88 ("Dyspnea [shortness of breath] becomes more severe and progressively less exertion is tolerated as the disease proceeds. ... Dyspnea at rest, edema associated with cor pulmonale, and ultimately respiratory failure may appear in the final stages of severe asbestosis."); George M. Lordi & Lee B. Reichman, *Pulmonary Complications of Asbestos Exposure*, AM. FAMILY PHYSICIAN 48(8):1471-77, 1474 (1993); Demers (1990), *supra*, at 11; Dement et al. (1986), *supra*, at 287 & 315; PULMONARY MEDICINE 641 (Clarence A. Guenter ed., 2d ed. 1982); Craighead et al. (1982), *supra*, at 575; Matti S. Huuskonen, *Clinical Features, Mortality & Survival of Patients with Asbestosis*, SCAND. J. WORK ENVIRON. & HEALTH 4:265-74, 269-70 & 272 (1978); Kleinerman (1994), *supra*, at 774.

the prevalence of dyspnea among patients with asbestosis is not associated with smoking history or habits.[15]

Assessment of dyspnea is a helpful tool for identifying patients with a worse prognosis.[16] It may appear even before lung abnormalities are detected radiographically.[17] Indeed, although radiographic evidence is a central criterion for diagnosing asbestosis, it underestimates the degree of interstitial fibrosis: "the chest x-ray can be normal even in the face of severe interstitial fibrosis."[18] Dyspnea is more prevalent, however, among those with radiographic abnormalities.[19]

As a result of the pulmonary damage caused by asbestosis, the patient may suffer additional symptoms including chest pain, fatigue, weight loss or anorexia, clubbing of the fingers,

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[15]Dement et al. (1986), *supra,* at 305.

[16]David A. Schwartz et al., *Longitudinal Changes in Lung Function Among Asbestos-Exposed Workers,* AM. J. RESPIR. CRIT. CARE MED. 150:1243-49, 1248 (1994).

[17]Dement et al. (1986), *supra,* at 315. *See also* Huuskonen (1978), *supra,* at 265 (breathlessness is often "out of proportion to the physical pulmonary signs and radiographic appearances common for asbestosis").

[18]Steven B. Markowitz et al., *Clinical Predictors of Mortality from Asbestosis in the North American Insulator Cohort, 1981 to 1991,* AM. J. RESPIR. CRIT. CARE MED. 156:101-108, 106 (1997) (citing study by Liddell and McDonald (1980) in which some subjects with negative x-rays died of asbestosis and study by Kipen et al. (1987) in which 23 of 25 subjects with negative x-rays showed moderate to severe fibrosis on histology); Irving J. Selikoff & Ruth Lilis, *Radiological Abnormalities Among Sheet-Metal Workers in the Construction Industry in the United States and Canada: Relationship to Asbestos Exposure,* ARCH. ENVIRON. HEALTH 46(1):30-36, 35 (1991); Bertram Mann, *Asbestosis,* RADIOGRAPHY 46:250-52, 251 (1980).

[19]Selikoff & Lilis (1991), *supra,* at 33 & 35.

and coughing.[20] The chest pain associated with asbestosis has been described as "either sharp and lacerating or aching in character," appearing spontaneously in the chest, back or abdomen and lasting for minutes or hours at a time.[21] Asbestosis also can cause pleural effusions, fluid buildup around the lungs that further restricts the patient's breathing.[22] In the final stages, the patient may suffer respiratory failure.[23]

In addition to its respiratory effects, asbestosis can impair cardiovascular function. Pulmonary fibrosis can increase resistance to blood flow through the capillary bed.[24] The increased resistance results from "thickening in the pulmonary small arteries and arterioles caused by muscular hypertrophy and subintimal fibrosis."[25] Even before the patient suffers clinically detectable decreases in respiratory function, he may develop pulmonary hypertension and "cor pulmonale," a potentially fatal complication that can lead to congestive heart

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[20]Lordi & Reichman (1993), *supra,* at 1474; Demers (1990), *supra,* at 11; Henry P. Pendergrass, *Diseases Related to Asbestos Exposure: Historical Perspective,* SOUTHERN MED. J. 80(12):1546-52, 1549 (1987); Dement et al. (1986), *supra,* at 315 (discussing cough, bronchitis and airway obstruction); PULMONARY MEDICINE, *supra,* at 641; Mann (1980), *supra,* at 251.

[21]Mann (1980), *supra,* at 251.

[22]Kleinerman (1994), *supra,* at 772 & 774; PULMONARY MEDICINE, *supra,* at 641; Craighead et al. (1982), *supra,* at 575.

[23]PULMONARY MEDICINE, *supra,* at 641.

[24]Demers (1990), *supra,* at 10; PULMONARY MEDICINE, *supra,* at 641.

[25]Kleinerman (1994), *supra,* at 772-73.

failure.[26] Studies consistently find increased mortality from cardiovascular disease among asbestos workers due to the increased stress on the cardio-pulmonary system.[27]

Asbestosis has also been connected to depressed immune function.[28] As fibrosis develops, the lung tissue becomes thickened and filled with immune cells — mononuclear cells, neutrophils, and macrophages.[29] The patient will be susceptible to pulmonary infections that are often fatal to those with advanced asbestosis.[30]

Asbestosis itself is thus a potentially deadly disease. Studies have shown that asbestosis patients have a statistically significant increased mortality from nonmalignant respiratory diseases, most frequently from asbestosis but also from the

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[26]Demers (1990), *supra*, at 10. *See also* Morgan & Seaton (1984), *supra*, at 333 (shortness of breath from asbestosis "progresses even when the patient is removed from contact with asbestos, usually resulting in the development of cor pulmonale and death within 15 years of the onset of the disease"); Huuskonen (1978), *supra*, at 265 (in 46 percent of patients whose underlying cause of death was asbestosis, the immediate cause of death was cor pulmonale).

[27]John M. Dement et al., *Exposure and Mortality Among Chrysotile Asbestos Workers, Part II: Mortality*, AM. J. IND. MED. 4:421-33, 425 (1983).

[28]Demers (1990), *supra*, at 10; Council on Scientific Affairs (1984), *supra*, at 2594; N. James Doll et al., *Immunopathogenesis of Asbestosis, Silicosis, & Coal Workers' Pneumoconiosis*, CLINICS CHEST MED. 4(1):3-14, 4-6 (1983); Craighead et al. (1982), *supra*, at 590.

[29]Banks (1980), *supra*, at 165. *See also* M. Turner Warwick et al., *Immunology and Asbestosis, in* BIOLOGICAL EFFECTS OF ASBESTOS (IARC SCIENTIFIC PUBLICATIONS No. 8) 258-63 (Int'l Agency for Research on Cancer, World Health Org. 1973) (finding elevated levels of antinuclear antibody and rheumatoid factor in asbestos-exposed workers).

[30]Demers (1990), *supra*, at 15.

increased infections that are connected to the disease.[31] Statistics may understate the mortality rate because asbestosis frequently goes unrecognized as a cause of death.[32] In one study of Finnish workers with asbestosis, 41.9 percent of the deceased patients died of asbestosis.[33] And contrary to the suggestion that serious cases of asbestosis are becoming a thing of the past, another recent study found greater mortality from asbestosis in the 1980s and 1990s than in the 1960s and '70s among a cohort of 17,800 insulation workers.[34] The risk of mortality is significantly greater with more advanced radiographic findings and/or clinical symptoms of asbestosis, like dyspnea.[35]

The first published account of death from asbestosis was in the 1920s; the patient's doctor identified her illness as "asbestos poisoning."[36] Her cause of death was certified, however, as "fibrosis of the lungs due to the inhalation of mineral particles [asbestos]."[37] Thousands more asbestos workers have died since then. There can be no doubt that asbestosis is a clinically serious pulmonary disease.

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[31]*See* Dement et al. (1986), *supra*, at 290-96 (summarizing motality studies in asbestos-exposed populations). *See also, e.g.*, Dement et al. (1983), *supra*, at 428.

[32]Markowitz et al. (1997), *supra*, at 107.

[33]Huuskonen (1978), *supra*, at 271.

[34]Markowitz et al. (1997), *supra*, at 104-105.

[35]*Id.* at 106.

[36]Irving J. Selikoff & Morris Greenberg, *A Landmark Case in Asbestosis*, J.A.M.A. 265(7):898-901, 898 (1991).

[37]*Id.* at 900.

II. THE OCCURRENCE OF ASBESTOSIS RELIABLY SIGNALS AN INCREASED RISK OF CANCER.

Petitioner contends that a diagnosis of asbestosis is irrelevant to any asbestos-related increased risk of cancer and that an increased risk is actually speculative, controversial and uncertain. To the contrary, there is general scientific consensus that exposure to asbestos at levels sufficient to cause asbestosis also causes significant increased risks of various cancers, most notably lung cancer and mesothelioma.[38] Specialist Victor Roggli has written that "the association of lung cancer with asbestosis is truly astounding, with somewhere between 40 percent and 65 percent of individuals with asbestosis ultimately succumbing to carcinoma of the lung."[39] Other sources cite similar figures: "When clinical asbestosis is present, the incidence of lung cancer is extremely high, averaging about 30 percent of deaths and ranging as high as 50 percent of deaths in published series."[40]

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[38]*See generally, e.g.*, Victor L. Roggli, *Human Disease Consequences of Fiber Exposures: A Review of Human Lung Pathology and Fiber Burden Data*, ENV. HEALTH PERSP. 33:295-303, 299 (1990) ("The association between asbestos exposure and lung cancer is widely accepted for patients with asbestosis."); James A. Talcott & Karen H. Antman, *Asbestos-Related Malignancy*, CURR. PROBL. CANCER 12(3): 133-79 (1988); RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985) ("It is now universally agreed that exposure of men and women to asbestos fibres can, under certain circumstances, lead to three diseases: asbestosis, lung cancer, and mesothelioma."); W.R. Parkes, *Silicates and Lung Disease*, *in* OCCUPATIONAL LUNG DISORDERS 233-96 (2d ed. 1982).

[39]Roggli (1990), *supra*, at 301.

[40]Andrew Churg, *Asbestos, Asbestosis and Lung Cancer*, MODERN PATHOL. 6(5):509-511, 510 (1993); *see also* Snider (1981), *supra*, at 293 ("As many as 50 percent of patients with asbestosis have been reported to

Studies of populations of exposed workers and asbestosis patients have repeatedly shown that those suffering clinically diagnosable asbestosis have highly elevated risks of lung cancer as compared both to the general population and to people exposed to asbestos but not suffering from asbestosis. For example, an autopsy study of deceased asbestos miners indicated that those with "slight asbestosis" faced odds of lung cancer roughly 5-8 times greater than those with no asbestosis and those with "moderate/pronounced" asbestosis faced odds of cancer 5-10 times greater than those without asbestosis.[41] Other studies have followed asbestos-exposed workers and examined their risk of dying of lung cancer compared with expected rates in the surrounding community, expressed as a "standardized mortality ratio" (SMR), which is the observed number of lung cancer deaths divided by the expected number of such deaths multiplied by 100. In a number of studies, SMRs were substantially elevated in those with asbestosis, ranging from 237 to 636, and were always higher than in those without asbestosis.[42] Some studies also have sought to determine the fraction of patients with asbestosis who ultimately develop lung cancer. In one such study, 11.7% of those with asbestosis

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die of bronchogenic carcinoma.").

[41]G.K. Sluis-Cremer & B.N. Bezuidenhout, *Relation Between Asbestosis and Bronchial Cancer in Amphibole Asbestos Miners*, BR. J. IND. MED. 46:537-40 (1989).

[42]Janet M. Hughes & Hans Weill, *Asbestosis as a Precursor of Asbestos Related Lung Cancer*, BR. J. INDUS. MED. 48:229 (1991) (SMR of 433); D.E. Fletcher, *A Mortality Study of Shipyard Workers with Pleural Plaques*, BR. J. IND. MED. 29:142-5 (1972) (SMR of 237); F.D.K. Liddell & J.C. McDonald, *Radiological Findings as Predictors of Mortality in Quebec Asbestos Workers*, BR. J. INDUS. MED. 37:257-67 (1980) (SMR of 350); W.O.C. Cookson et al., *Compensation, Radiographic Changes and Survival in Applicants for Asbestosis Compensation*, BR. J. INDUS. MED. 42:461-68 (1985) (SMR of 636).

developed lung cancer after approximately 23.4 years of employment and 35.5 years of follow-up.[43] Another study of 155 men diagnosed with asbestosis between 1968 and 1974 revealed 59 deaths on follow-up: 39% from lung cancer, 10% from mesothelioma.[44]

It is generally agreed that asbestos is a carcinogen.[45] But while evidence exists that asbestos-related lung cancer may develop in the absence of asbestosis,[46] the association between asbestosis and lung cancer is so strong that some researchers (and, frequently, defendants in asbestos litigation) argue that a diagnosis of lung cancer cannot reliably be linked to asbestos

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[43]Hughes & Weill (1991), *supra*. Additional follow-up would be expected to show additional lung cancers, as more patients would develop cancer as the latency period progresses.

[44]I.I. Coutts & M. Turner-Warwick, *Factors Predicting Outcome in Intrapulmonary Fibrosis Associated with Asbestos Exposure (Asbestosis)*, *in* OCCUPATIONAL LUNG DISEASE 208 (J. Bernard L. Gee et al. ed., Am. Coll. Chest Physicians 1984).

[45]For example, the Department of Health and Human Services (DHHS), the Environmental Protection Agency (EPA), and the International Agency for Research on Cancer (IARC) agree that asbestos is a human carcinogen. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, CAS# 1332-21-4, PUBLIC HEALTH STATEMENT FOR ASBESTOS (2001), http://www.atsdr.cdc.gov/toxprofiles/phs61.html; U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNOLOGY TRANSFER NETWORK, AIR TOXICS WEBSITE, ASBESTOS 133-21-4 http://www.epa.gov/ttnatw01/hlthef/asbestos.html.

[46]Gunnar Hillerdal, *Pleural Plaques and Risk for Bronchial Carcinoma and Mesothelioma*, CHEST 105:144-50 (1994); Liddell & McDonald (1980), *supra*; K.M. Martischnig et al., *Unexpected Exposure to Asbestos and Bronchogenic Carcinoma*, BRIT. MED. J. 1:746-49 (1977). *See also* Douglas W. Henderson et al., *Asbestos-Related Lung Cancer: Is it Attributable to Asbestosis, or to Asbestos Fiber Burden?*, *in* PATHOLOGY OF LUNG TUMORS 83, 104 (B. Corrin ed., 1997) (noting this disagreement).

exposure absent asbestosis as a precursor.[47] The association between asbestosis and lung cancer holds true even where asbestosis does no appear on x-rays but is confirmed by pathologic examination of the lung tissue.[48] However, the relative risk of developing lung cancer appears to increase with the severity of pulmonary fibrosis due to asbestosis,[49] and tumors appear to form more often in areas of fibrosis.[50]

Although it is generally agreed that asbestosis signals a significantly increased risk of lung cancer *beyond* the risk associated with asbestos exposure alone, the nature of the association is still in dispute.[51] Some researchers have

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[47]*Compare, e.g.*, Philip T. Cagle, *Criteria for Attributing Lung Cancer to Asbestos Exposure*, AM. J. CLIN. PATH. 117:9-15 (2002) (arguing that attribution of lung cancer to asbestos exposure can be made only when asbestosis is present) *with* M.M. Finkelstein, *Radiographic Asbestosis Is Not a Prerequisite for Asbestos-Associated Lung Cancer in Ontario Asbestos-cement Workers*, AM. J. INDUS. MED. 32:341-48 (1997)(acknowledging association but arguing that asbestos-related lung cancer occurs even in non-asbestotics).

[48]Paul Wilkinson et al., *Is Lung Cancer Associated with Asbestos Exposure When There Are No Small Opacities on the Chest Radiograph?*, LANCET 345:1074-78 (1995); Sluis-Cremer & Bezuidenhout (1989), *supra*; H.M. Kipen et al., *Pulmonary Fibrosis in Asbestos Insulation Workers with Lung Cancer: a Radiological and Histopathological Evaluation*, BR. J. INDUS. MED. 44:96-100 (1987).

[49] *See, e.g.*, Henderson et al. (1997), *supra*, at 83.

[50]Churg (1993), *supra*, at 510; Parkes (1982), *supra*, at 270; Doll & Peto (1985), *supra*, at 2 ("As a rule, the tumor arises in the vicinity of the fibrosis and, therefore, occurs chiefly in the lower parts of the lungs — usually the lower lobes."). *See also* Roggli (1990), *supra*, at 299 (because fibrosis is generally concentrated in the lower lobes, "there is an increased predominance of lower lobe cancers among asbestos workers in contrast to the upper lobe predominance among nonexposed cigarette smokers").

[51] *See, e.g.*, Henderson et al. (1997), *supra*, at 104.

theorized that immunologic deficits caused by asbestosis may weaken the body's ability to destroy potentially malignant cells.[52] Others believe that the fibrosis itself creates the increased risk.[53] And others contend that the increased fiber burden that typically accompanies (and causes) asbestosis also causes the increased risk of cancer.[54] Whatever the mechanisms involved, the association between asbestosis and lung cancer cannot be ignored.

The occurrence of asbestosis tangibly and objectively demonstrates that a person faces a significant increased risk of cancer beyond that of the general population. Reports associating lung cancer with asbestosis first appeared in 1935.[55] Since then, study after study has confirmed the strong association between the two diseases.[56] Some scientists have gone so far as to opine that "detailed examination of both human and animal data reveal that it is not high exposure per se,

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[52]Parkes (1982), *supra*, at 271-72.

[53] *See, e.g.*, Henderson et al. (1997), *supra*, at 86.

[54]*Id.* at 86-87.

[55] K. M. Lynch & W.A. Smith, *Pulmonary Asbestosis III: Carcinoma of the Lung in Asbestos-Silicosis*, AM. J. CANCER, 24:56-64 (1935); S.R. Gloyne, *Two Cases of Squamous Carcinoma of the Lung Occurring in Asbestosis*, TUBERCLE 17:5-10 (1935-36).

[56]Hughes & Weill (1991), supra; Sluis-Cremer & Bezuidenhout (1989), *supra*; Kipen et al. (1987), *supra*; I.I. Coutts et al., *Mortality in Cases of Asbestosis Diagnosed by a Pneumoconiosis Medical Panel*, THORAX 42:111-16 (1987); Cookson et al. (1985), *supra*; Murial L. Newhouse et al., *Mortality of Factory Workers in East London 1933-80*, BR. J. INDUS. MED. 42:4 (1985); G. Berry, *Mortality of Workers Certified by Pneumoconiosis Medical Panels as Having Asbestosis*, BR. J. INDUS. MED. 38:130-37 (1981); Liddell & McDonald (1980), *supra*; Huuskonen (1978), *supra*; Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, BR. J. INDUS. MED. 12:81-86 (1955).

but the actual presence of asbestosis that is associated with an increased lung cancer risk."[57] The existence of a significant association between asbestosis and cancer is not a matter of substantial disagreement within the scientific community.

III. SMOKERS EXPOSED TO ASBESTOS FACE SUBSTANTIAL CANCER RISKS BEYOND THE RISKS ASSOCIATED WITH SMOKING ALONE.

Petitioner suggests that the risk of lung cancer caused by smoking renders insignificant any asbestos-related increased risk of cancer in people who smoke. But asbestos exposure in fact causes significantly increased risks of cancers that have no causal relationship to tobacco smoke, most notably pleural and peritoneal mesotheliomas — cancers that are generally fatal within a year of the onset of symptoms.[58] And even with respect to lung cancer, asbestos exposure is known to put cigarette smokers at a substantially increased risk over smokers not exposed to asbestos.

Tobacco smoking and asbestos exposure are widely understood to have a "synergistic" effect, multiplying and thus dramatically increasing the risk to people who experience both

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[57]Churg (1993), *supra*, at 509.

[58] *See, e.g.*, Marc M. Dunn, *Asbestos in the Lung*, CHEST 95(6):1304-308 (1989); Parkes (1982), *supra*, at 286 ("Cigarette smoking is not related to the development of this tumor [mesothelioma]."); Doll & Peto (1985), *supra*, at 3; Arthur L. Frank, *Asbestos as an Air Pollutant and Synergism with Smoking*, CANCER DET. & PREV. 9:337-41, 338 (1986) ("there is no apparent relationship to the development of mesothelioma among cigarette smokers"); Andrew M. Churg, *Diseases of the Pleura*, in PATHOLOGY OF THE LUNG 851 (W.M. Thurlbeck & A.M. Churg eds., 2d ed. 1995) (citing studies showing mean survival following onset of symptoms of mesothelioma to be 12.5 months and 7 months).

exposures.[59] While cigarette smoking in the absence of asbestos exposure increases the risk of lung cancer by approximately ten times as compared to non-smokers, an asbestos-exposed smoker faces *fifty to sixty times* the risk experienced by a never-exposed non-smoker.[60] In short, asbestos-exposed smokers have ample reason to fear cancers that have no connection to smoking whatsoever, and *far greater reason* to fear lung cancer than smokers who were never exposed to asbestos.

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[59]A. Churg & F.H.Y. Green, *Occupational Lung Disease,* in PATHOLOGY OF THE LUNG 851 (W.M. Thurlbeck & A.M. Churg eds., 2d ed. 1995); Hammar & Dodson (1994), *supra,* at 901; H. Vainio & P. Boffetta, *Mechanisms of the Combined Effect of Asbestos and Smoking in the Etiology of Lung Cancer,* SCAND. J. WORK ENVIRON. HEALTH 20:235-42 (1994); S. Donald Greenberg & Victor L. Roggli, *Carcinoma of the Lung, in* PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 189-210 (V.L. Roggli et al. eds., 1992); Dunn (1989), *supra,* at 1306 ("asbestos exposure and smoking are synergistic in the promotion of bronchogenic carcinoma"); Frank E. Speizer, *Environmental Lung Disease*, in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1068 (Eugene Braunwald, et al. eds., 11th ed. 1987); Parkes (1982), *supra,* at 271 ("The effects of smoking and asbestosis appear to be synergistic and multiplicative."); J.C. McDonald, *Asbestos-Related Disease: an Epidemiologic Review, in* BIOLOGICAL EFFECTS OF MINERAL FIBERS 587-602 (J.C. Wagner ed., 1980); Irving J. Selikoff & E. Cuyler Hammond, *Asbestos and Smoking*, J.A.M.A. 242: 458-59 (1979); R. Saracci, *Asbestos and Lung Cancer; an Analysis of the Epidemiological Evidence on the Asbestos-smoking Interaction,* INT. J. CANCER 20:323-31 (1977).

[60]Nicholas H. de Klerk et al., *Smoking, Exposure to Crocidolite, and the Incidence of Lung Cancer and Asbestosis*, BR. J. INDUS. MED. 48:412-17 (1991); G. Berry et al., *Combined Effect of Asbestos and Smoking on Mortality from Lung Cancer and Mesothelioma in Factory Workers*, BR. J. INDUS. MED. 42:12-38 (1985); J. Corbett McDonald & Alison D. McDonald, *Epidemiology of Asbestos-Related Lung Cancer, in* ASBESTOS-RELATED MALIGNANCY 57-79 (K. Antman & J. Aisner eds., 1985); E. Cuyler Hammond et al., *Asbestos Exposure, Cigarette Smoking, and Death Rates*, ANN. N.Y. ACAD. SCI. 330:473-91 (1979).

Although scientists agree that the combination of smoking and asbestos creates a grave risk of cancer, uncertainty remains about the mechanisms of the synergistic relationship. Whatever the mechanisms or causes of the synergistic relationship, however, its effect is to dramatically increase the risk of lung cancer among asbestos-exposed smokers over that experienced by non-exposed smokers.

IV. A DOCTOR'S ADVICE ABOUT FUTURE CANCER RISK IS A RELIABLE SOURCE OF INFORMATION AND A CRITICAL PART OF THE PATIENT'S MEDICAL CARE.

Finally, petitioner and its amici suggest that a patient's fear of cancer is somehow fabricated or unreasonable because it is based on information from the patient's doctor and is not an independent or "natural" fear.[61] It is a central part of the doctor's responsibility to advise patients on health issues, and patients reasonably rely on such advice every day. It seems remarkable then to suggest that, unless the patient is an epidemiologist with independent knowledge of his or her future risks, the patient's understanding based on medical advice about the consequences and risks associated with his illness must somehow be disregarded.

In addition, information from the physician about an asbestosis patient's future risk of cancer serves an important medical function. Because asbestosis is incurable and largely

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[61]Actually, many asbestos workers know of their increased risk of cancer long before they are diagnosed with asbestosis and informed of the risk by their doctor. *See* Allen H. Lebovits et al., *Chronic Occupational Exposure to Asbestos: More than Medical Effects,* J. OCC. MED. 30(1):49-54, 51 (1988) (finding that asbestos workers knew of increased risk an average of 18 years before participating in study).

untreatable,[62] management of the disease depends on patient education.[63] Behavioral changes can affect the future risk of cancer, and it will be particularly important for the doctor to discuss these issues with the patient.[64] For example, because of the synergistic effect between asbestos and smoking, "cessation of smoking is likely to confer an even greater avoidance of risk of lung cancer in people with a history of heavy asbestos exposure than in the population at large."[65] The doctor will also need to discuss with the patient the need for medical monitoring resulting from the increased risk of cancer.[66] Medical information and advice from a treating physician is both reasonably reliable and necessary to the patient's treatment.

As a result, asbestosis patients do have a relatively higher, and medically reasonable, concern about their risk of

[62]*See* Parkes (1982), *supra,* at 273 ("There is no treatment at present known which will arrest or retard the progress of asbestosis").

[63]Demers (1990), *supra,* at 15.

[64]Demers (1990), *supra,* at 15.

[65]Doll & Peto (1985), *supra,* at 3. *See also* AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, CAS# 1332-21-4, TOXFAQS FOR ASBESTOS (2001), http://www.atsdr.cdc.gov/tfacts61.html; Dement et al. (1986), *supra,* at 319 ("asbestos workers should be educated on the multiplicative risks of smoking and asbestos exposure"); Theodore L. McLemore et al., *Update on Asbestos-Associated Pulmonary Disease,* TEXAS MED. 77:38-46, 42 (1981) (emphasizing the role of the primary physician in alerting patients to their increased risk of cancer and advising cessation of smoking).

[66]Parkes (1982), *supra,* at 272 ("This risk of bronchial carcinoma complicating asbestosis must always be borne in mind especially in individuals who smoke and have had long exposure to asbestos. In order to identify the growth as early as possible it is advisable to examine workers with more than 10 years exposure to asbestos routinely at yearly intervals.").

contracting cancer.[67] "This health concern appear[s] to be firmly related to actual physical health status, such that deteriorating health [leads] to increasing somatic concern, increasing levels of mood state disturbance, and deteriorating mental health functioning."[68] Thus, when an asbestos worker has been diagnosed with asbestosis and begins to experience the symptoms associated with that disease, his or her actual fear of cancer is likely to increase for psychological as well as practical reasons. "The constant threat of cancer vulnerability exacts its psychological toll as well."[69] The fear of cancer has a significant impact on the patient's health and well-being, separate from the physical impact of asbestosis.

CONCLUSION

The medical literature cited and discussed in this brief demonstrates that the characterizations of petitioner and its amici regarding the nature of asbestosis and its relationship to cancer and to smoking are not representative of generally accepted views within the medical and scientific community. APHA urges the Court, in deciding the issues in this case, to recognize the substantial body of medical and scientific evidence that asbestosis is a genuine disease and that its diagnosis in a patient is associated with a substantial risk of asbestos-caused cancer.

[67]Lebovits et al. (1988), *supra,* at 52.

[68]*Id.*

[69]*Id.* at 54.

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NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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BRIEF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The Brotherhood of Locomotive Engineers ("BLE") is North America's oldest rail labor union. Established in 1863, the purpose of the union, as stated in the BLE Constitution, is "to combine the interests of locomotive engineers or other persons in railway service . . . (to) guard their financial interests, and promote their general welfare and safety." The BLE's total membership is more than 59,000, and its active members include 35,000 railroad workers in the United States and Canada.

The Brotherhood of Locomotive Engineers believes that the position advocated by the Petitioner and the railroad industry (through the amicus brief of the Association of American Railroads) with regard to principles of joint and several liability under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, threatens to undermine and negate central protections afforded by Congress to injured railroad workers under the FELA. The position advocated by the Petitioner and the railroad industry would fundamentally reshape and refashion principles of liability under the FELA which have been in place for nearly a century. The BLE further believes that the position advocated by the Petitioner and the railroad industry would disturb virtually every aspect of Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the FELA, in a manner antithetical to the intentions of Congress.

The BLE offers this Brief as amicus curiae in support of Respondents. For the reasons set forth below, the BLE respectfully

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[1]No person or entity other than BLE has made monetary contributions toward this Brief and no counsel for any party authored this Brief in whole or in part. Letters of consent by the parties to the filing of this Brief have been filed with the Court.

submits that this Court should reject Petitioner's argument that principles of joint and several liability be abolished or curtailed under the FELA. This Brief does not address the first question presented by N&W's Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Brotherhood of Locomotive Engineers represents over 35,000 railroad workers throughout the United States and Canada, and has been in existence for nearly 140 years. In virtually every Congressional session over the past several decades, the Brotherhood of Locomotive Engineers has been forced to resist lobbying efforts by the railroad industry intended to abolish or weaken the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* The efforts of the railroad industry have proven unsuccessful, however, and the statute – in existence for nearly a century – has remained substantively unchanged for over 50 years. (Amendments prior to that only strengthened the Act.) As reflected in the amicus briefing of the Association of American Railroads, the railroad industry is now attempting to seize upon the unusual facts of this case to accomplish through the judiciary what it has not been able to accomplish legislatively – the abolition or limitation of key protections afforded by Congress to injured railroad workers through the FELA.

The railroad industry seeks to accomplish this by urging this Court to disregard the historic mandate of Congress, and nearly a century of judicial precedent, and abolish perhaps the core tenet of the FELA – that if a railroad's negligence, in whole or in part, plays any role in an employee's receipt of injury, it is responsible for all damages sustained by its employee, except those attributable to the employee's own contributory negligence. 45 U.S.C. §§ 51, 53. The Brotherhood of Locomotive Engineers accordingly offers this amicus brief to address the critical apportionment issue presently before this Court.

Due to the transitory nature of railroad work, railroad employees are frequently required to work in states far from their homes, upon property owned by industries with whom their employers have contracted. Their duties often demand that they work upon trackage and equipment owned by other railroads, and place them in a position where their safety – and, indeed, their very lives – may depend upon the care and caution exercised by employees of other railroads and enterprises. The Congressional mandate that railroad employers be responsible for all damages caused in whole or in part by their negligence, except for the contributory negligence of the employee himself, ensures that workers are actually compensated for their injuries, and that their rights under the FELA are not rendered illusory by requiring them to seek recompense not only from the railroad which employed them, but also from persons and entities in remote locations, against whom prosecution of a legal claim, and from whom collection of any judgment, may be difficult or cost prohibitive. The Congressional scheme behind the FELA permits railroads to recoup damages attributable to third-party negligence through contracts of indemnification and legal claims for contribution. This Congressional scheme recognizes, however, that the burden of seeking recompense when third-party negligence is involved is more fairly and appropriately placed upon a railroad engaged in interstate commerce, than upon a lone injured railroad worker who has no control over where his employer sends him to perform his duties, or the persons, third-party railroads, or industries with whom his employer requires him to work.

To be clear, the railroad industry has seized upon this appeal as an opportunity to attempt to undermine and circumvent the central principle of liability of a nearly century-old Federal system of compensation for injured railroad workers. The position advocated by the railroad industry would also critically undermine, and at times entirely negate and destroy, other central Congressional objectives behind the FELA. To this end, the railroad industry seeks to circumvent and thwart important rights and protections afforded to

injured railroad workers under the Federal Act in numerous fundamental respects:

1. **The Federal Employers' Liability Act was intended as remedial social legislation to promote, ease, and facilitate recovery by workers injured in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994). Requiring railroad employees to commence costly actions against other persons or entities – potentially located a great distance away and of possibly questionable financial solvency – would create an obstacle and impediment to full and proper recovery which was not intended by Congress, and which has at no time existed during the century-long history of the FELA. In practical terms, in many instances, full and proper compensation to injured railroad workers would no longer be achieved, and the primary purpose for which the FELA was enacted would be thwarted. The families of workers killed in the line of duty would also, in many instances, be effectively left without proper financial recovery in a broad class of cases where third-party negligence is involved.**

2. **In enacting the Federal Employers' Liability Act, Congress intended to create a uniform right and remedy for injured railroad workers, which would not be affected by the vagaries of state law. *Dice v. Akron C. & R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952). Requiring injured railroad workers to commence common law claims against other industries or individuals in this large class of cases involving potential third-party negligence would undermine the national uniformity intended by Congress, and make the recovery received by injured railroad workers to a large part dependent upon the negligence law of the state where they happened to be injured. Certain common law defenses – which Congress**

intended to remove as an impediment to recovery by injured railroad workers – would become prominent in railroad personal injury litigation.

3. **One of the purposes of the Federal Employers' Liability Act was to promote safety within the railroad industry. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958). To this end, courts have recognized that the FELA imposes upon railroads a continuing, non-delegable duty to provide their workers with a safe place in which to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). The Congressional scheme behind the FELA recognizes that a railroad requiring its employees to work at locations controlled by a third party is in a better position to ensure that those locations are safe than is the individual worker. *Sinkler*, *supra at* 329-30, 761-62. The continuing, non-delegable duty imposed under the FELA is made meaningful through the principle that employer railroads are deemed fully liable for all damages caused in whole or in part by their negligence, save those caused by the worker's contributory negligence. If adopted, the position advocated by the railroad industry would, in practical terms, mean that railroads no longer have a continuing, non-delegable duty to provide their employees with a safe place to work, but could avoid liability by shifting the blame to others, significantly increasing the hazards attendant to an already dangerous industry.**

4. **One of the principal protections afforded to injured railroad workers under the FELA is the right to selection of forum. Congress recognized that it would be unduly burdensome for railroad workers, frequently called upon to perform their duties in states far away from their homes, to be required to maintain suit where the accident**

occurred. A liberal venue provision was accordingly established under the FELA, providing injured railroad workers with broad and statutorily unique discretion in determining the forum in which their action will be tried. 45 U.S.C. § 56. Under the FELA, choice of venue is a substantial, substantive right afforded by Congress to injured railroad workers. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949). Congress' intention to permit FELA plaintiffs to choose their legal forum would be effectively defeated through adoption of the position advocated by the railroad industry in this litigation, the practical effect of which would be to force injured railroad workers in a large class of cases to bring suit in distant locations where jurisdiction over third parties might be obtained in order to have a chance at obtaining full and complete compensation for their injuries.

In sum, the position advocated by the railroad industry in this appeal would disturb – in truly fundamental ways – Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the Federal Employers' Liability Act. The railroad industry should not be permitted to accomplish by judicial fiat what it has not been able to obtain through the legislative process in proposing fundamental modification of this nearly 100-year-old law.

ARGUMENT

I. IN ENACTING THE FEDERAL EMPLOYERS' LIABILITY ACT, IT WAS THE INTENTION OF CONGRESS THAT WHEN THE NEGLIGENCE OF THE EMPLOYER RAILROAD COMBINED WITH THE NEGLIGENCE OF A THIRD PARTY TO CAUSE INJURY TO ONE OF ITS EMPLOYEES, THE RAILROAD WOULD BE LIABLE FOR ALL INJURIES SUSTAINED BY THE WORKER (SAVE FOR THOSE DAMAGES ATTRIBUTABLE TO THE WORKER'S OWN CONTRIBUTORY NEGLIGENCE).

At the turn of the last century, Congress became appalled by the carnage American railroads were leaving in the wake of their operations. As stated by Representative Mann on the floor of the United States House of Representatives in 1906:

> In three months of last year there were 931 railroad employees killed at their posts of duty. In three months of last year, there were 13,217 railroad employees injured at their post of duty, not mentioning those who met such slight injuries as only required layoff of two or three days.

40 Cong. Rec. 4606 (1906). In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3, 84 S.Ct. 1113, 1115, 12 L.Ed.2d 89, 91 (1964), the United States Supreme Court states:

> Railroad work at that time was indeed dangerous. In 1888 the odds against a railroad brakeman's dying a natural death were almost four to one; the average life expectancy of a switchman in 1893 was seven years.

Given the terrible scale of injury and death caused by railroad operations, Congress examined the laws to which employees were required to turn for redress. Congress found those laws wholly

deficient. "(J)udges had created numerous defenses – fellow-servant rule, assumption of risk, contributory negligence – so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work." *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed.2d 497, 507 (1949) (J. Douglas concurring).

In response to the dangers of the railroad workplace and the deficiencies in the employee's common law remedies, Congress determined to change the common law. It accomplished this through enacting the FELA. "The law was enacted because Congress was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493, 500 (1957). The FELA is "an avowed departure from the common law." *Sinkler v. Missouri Railroad Co.*, 356 U.S. 326, 78 S.Ct. 758, 762, 2 L.Ed.2d 799, 802 (1958).

In enacting the FELA, Congress, in the words of the *Rogers* court, "stripped" railroads of common law defenses which had previously acted as a bar to recovery by injured workers. *Rogers*, 352 U.S. at 507-508, 77 S.Ct. at 449, 1 L.Ed.2d at 500. Congress further supplanted the common law duty owed by a master to its servant "with the far more drastic duty of paying damages for injury and death at work due in whole or in part to the employer's negligence." *Rogers*, 352 U.S. 500, 507, 77 S.Ct. 443, 448 (1956). Congress achieved this purpose through the plain language of 45 U.S.C. § 51:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . resulting ***in whole or in part*** from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . . (Emphasis added.)

By this simple and direct language, "it is clear that the general Congressional intent was to provide liberal recovery for injured

workers . . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382, 388 (1958).[2]

The only exception carved out by Congress to the mandate that an employer railroad be held liable for all damages caused in whole or in part by its negligence was for damage directly caused by the contributory negligence of the employee himself. *See* 45 U.S.C. § 53 which, in effect, established a system of pure comparative negligence under the FELA. Even this potential offset to railroad liability was limited by Congress, however, and, under Section 53, contributory negligence may not be raised as a defense at all when the railroad's violation of a Federal railroad safety statute has played any role in the worker's receipt of injury. 45 U.S.C. § 53.

Both Federal and state courts throughout the country have historically recognized that the liability scheme established by Congress – rendering an employer railroad liable for all damages caused in whole or in part by its negligence, with the only offset being for the employee's contributory negligence under certain limited circumstances – was, in effect, intended to create a system of joint and several liability in cases where railroad negligence combined with negligence of a third party to cause injury to a worker. As stated by the court in *Gaulden v. Burlington Northern, Inc.*, 232 Kan. 205, 654 P.2d 383, 389 (1982):

> FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of

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[2]The United States Supreme Court has historically made clear its commitment to liberally construe the FELA to effectuate its remedial purposes. "We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish (Congress') objectives.'" *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563, 571 (1987) (editorial parenthetical in text), *quoting Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030, 93 L.Ed.2d 1282, 1298 (1949).

> the fault of any third person. Liability is thus imposed upon the carrier for all damages sustained by its employee except any part attributable to the negligence of the employee, if the injury is wholly or partly caused by the railroad's negligence. The purpose of the Act is to require the employer to pay damages to an injured employee if the employer in any way caused or contributed to the injury.

In accord, *see Stephens v. Southern Pacific Transportation Co.*, 991 F.Supp. 618, 619 (S.D. Tex. 1998) ("FELA incorporates traditional joint and several liability principles, such that the employer may be jointly liable with third parties and may seek indemnification from such other tortfeasors"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1135 n.26 (5th Cir. 1995) (FELA incorporates "traditional principles of joint and several liability"); *Mazyck v. Long Island Railroad Co.*, 896 F.Supp. 1330, 1333 (E.D.N.Y. 1995) ("(C)ourts that have considered this question have concluded that the well established principles of joint and several liability apply to cases under the FELA"); *St. Louis Southwestern Ry. v. Board of County Comm'rs*, 716 F.Supp. 13, 14 (D. Kan. 1989) ("FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of the fault of any third person").

The United States Supreme Court has recognized that the purpose of Congress in enacting the FELA was to shift certain burdens which had previously fallen upon injured railroad workers to the railroads themselves. As stated by the United States Supreme Court in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958):

> This statute, an avowed departure from the rules of the common law (citations deleted), was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. (Citations deleted.) The cost of human injury, an inescapable expense of railroading, must

> be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. (Citations deleted.) The Senate committee which reported the Act stated that it was designed to achieve the broad purpose of promoting "the welfare of both the employer and the employee, by adjusting the losses and injuries inseparable from injury and commerce to the strengths of those who in the nature of the case ought to share the burden."

Railroad work is, to a large extent, transitory in nature, and railroad workers are frequently required by their employers to perform their duties in states far away from their home, working with individuals and entities over whom they have no control, but with whom their employers have chosen to contract. Simply put, the Congressional scheme behind the FELA recognizes that the burden of seeking recompense when third-party negligence is involved is more fairly and appropriately placed upon the railroad engaged in interstate commerce than upon the individual worker who has no control over where his employer sends him to perform his duties or the persons or entities with whom his employer requires him to work. To this end, the United States Supreme Court has historically recognized that railroading is a "unitary enterprise" involving many railroads, industries, and workers, and that railroads in FELA actions should not be permitted to escape liability by attempting to place blame on someone else involved in that "unitary enterprise." In *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 11, 83 S.Ct. 1667, 1673-74, 10 L.Ed.2d 709 (1963), for example, the employer railroad sought to avoid liability under the FELA by claiming that the car upon which its employee was injured was owned by another railroad. In rejecting the railroad's claim that it should not be held negligent for conduct attributable to this third party, the United States Supreme Court states:

> Although recovery in this case is supported by the common law, it is also required by any reasonable construction of the Federal Employers' Liability Act itself. As we stated in

Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799: ***"It was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor."*** If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk. *Cf. Texas & Pac. R. Co. v. Archibald*, 170 U.S. 665, 673, 18 S.Ct. 777, 42 L.Ed. 1188. (Emphasis added.)

The FELA's legislative history makes clear that Congress recognized that since it was the railroad employer which had effective control over the locations where its employees were required to work, and the third-party actors to whom its employees would be exposed, any burden resulting from third-party negligence should properly be placed on the employer. In *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 541 (1993), *cert. den.* 514 U.S. 1037, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), the court discusses the legislative history in this regard:

> The FELA was designed not simply to discourage negligent conduct, for indeed, the common law at the FELA's passage provided rail workers an action for negligence. Rather, the Act was designed with a broader purpose in mind: "To provide liberal recovery for injured workers," *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1957), and thus, "to put on the railroad industry some of the costs for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*,

336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949) (concurring opinion of Justice Douglas). It accomplished these purposes by creating a statutory scheme that "stripped" [an employer] of his common law defenses," and granted recovery if the "employer[s] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-7, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1956). These dramatic changes evinced a clear Congressional intent "favoring unburdened and expeditious recoveries" by rail workers. *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979).

The FELA's legislative history testifies to this truth:

> [T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.
>
> ***It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor case (210 U.S. 281), "measurably control their causes."***
>
> The passage of the original Act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as Congressional power can extend, those rules of the common law which the President, in a recent speech at Chicago, September 16, 1909,

> characterized as "unjust." President Taft in his address . . . referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."
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> (Quoting from 45 Cong. Rec. 4041 (1910)). (Emphasis added.)

The legislative history of the Federal Employers' Liability Act further evidences an appreciation by Congress that requiring railroad workers to travel a great distance in order to obtain full recovery for their injuries would place an onerous burden upon those workers and, in many instances, would render their rights under the FELA effectively meaningless. *See, Ford v. Burlington Northern Railroad Co.*, 250 Mont. 188, 819 P.2d 169, 173-174 (1991), *aff.* 504 U.S. 648, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992), *citing* 45 Cong. Rec. at 4034-4035 (1910). Again, this burden was deemed more appropriately placed upon the employer railroad (which, if subject to the Act, was engaged in active interstate commerce), than upon the individual employee.

Through this appeal, the railroad industry attempts to have this Court shift the burden of recouping damages from negligent third parties from the employer railroad – where Congress, for sound public policy reasons, placed that burden – to the injured worker himself. No principled reason exists for such a radical shift. Although not as hazardous as it was at the turn of the last century, railroad work "even today is one of the most dangerous industries in this country." *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156, 1158 (3rd Cir. 1992); *citing* Jerry J. Phillips, "An Evaluation of the Federal Employers' Liability Act," 25 San Diego L. Rev. 49, 50-52 (1988). Moreover, the burden of requiring injured railroad workers to track down potentially negligent third parties of questionable solvency in remote parts of the country to obtain recovery for their injury is no less onerous today than it was 100 years ago.

Petitioner's argument that Congress could not have meant to establish what amounts to a system of joint and several liability under the FELA because the principle of joint and several liability was not widely recognized at the time of enactment of the FELA is inaccurate. See the excellent discussion of the historical development of the rule of joint and several liability in *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1124-1130 (5th Cir. 1995). This case notes that "the traditional rule of joint and several liability can be traced back to eighteenth century England, in the case of *Hill v. Goodchild*, 98 Eng. Rep. 465, 5 Buff. 2790 (K.B. 1771)" and demonstrates that the rule had become widely accepted in American common law by the time of enactment of the FELA. *Coats, supra at* 1124-1125. Indeed, numerous courts have forthrightly noted that there is nothing in the language of the FELA "intended to abrogate the common-law principles of joint and several liability" *in existence at the time the FELA was enacted. Mazyck v. Long Island Railroad Company*, 896 F.Supp. 1330, 1332-1333 (E.D.N.Y. 1995). In accord, *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 (5th Cir. 1988), *cert. denied* 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989).

Petitioner further argues that, regardless of the intent of Congress at the time of enactment of the FELA, this Court should, in effect, declare that principles of joint and several liability are no longer viable under the common law, and hence declare that principle no longer applicable in FELA cases. Petitioner's suggestion that principles of joint and several liability have been repudiated by the courts of this country in recent years, and that the common law has come to reject this rule, is entirely unfounded. Indeed, the American judiciary has, in recent years, repeatedly endorsed the fundamental logic and fairness of the principle of joint and several liability. (See expansive survey of state cases in Brief Amica Curiae of American Law Professors in Support of Respondents, Section D.) With only a handful of exceptions, changes in state joint and several liability laws in recent years have resulted from legislative action in response to intensive "tort reform" lobbying. *Coats, supra at* 577. Moreover, when principles of joint and several liability have been addressed by

state legislatures, joint and several liability has not typically been rejected, but only modified. *Restatement (Third) of Torts on Apportionment of Liability* § 17 cmt. A at 147.

The fact that recent changes in state joint and several liability law have generally been enacted by state legislatures, and not imposed by the courts, demonstrates the impropriety of the railroad industry's attempt to utilize this appeal as a device to attempt to obtain through the judiciary a fundamental change in the Federal Employers' Liability Act it has been unable to obtain from Congress. In *Coats, supra*, the court observed that any change in joint and several liability law is one uniquely appropriate for legislative determination. To this end, the Fifth Circuit Court of Appeals notes that those state legislatures which have elected to modify traditional state law principles of joint and several liability have done so in highly divergent ways and that seven distinctly different statutory schemes have emerged. *Coats, supra* at 1133. The court further notes that many states have adopted a hybrid of these basic schemes, creating even additional systems of reallocation and apportionment. The court states, *supra at* 1133:

> Significantly, however, most of the states that modify joint and several liability have adopted a hybrid approach by enacting statutory schemes that incorporate more than one of the above-mentioned trends. . . . ***Each scheme represents a unique blend of policy considerations weighed by the respective state legislatures.*** (Emphasis added.)

In *Coats*, a number of maritime industries sought to judicially overturn the principle of joint and several liability which had been applied under general maritime law for more than a century. The court rejected their argument, recognizing the sound public policy principles which support application of this rule. *Coats, supra at* 1136. The court further held that even if a change in the joint and several liability rule were warranted, such a fundamental change in

the law as proposed by the maritime industry was properly accomplished by Congress, and not the judiciary. The court states:

> The wide spectrum of legislative enactments across the country demonstrates the various policy objectives obtainable by altering joint and several liability. Most notable are the distinctions based upon causes of action and types of damages. The Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to Congressional action here is the wiser course. Even here we stand on maritime tradition, for even the earliest jurists appear to have counseled deference to the Legislature.
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> . . .
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> This turn of the political light upon tort law only stiffens our resolve not to attempt to run in front of the Congress. Leading a political charge is not an appropriate role for a Federal court, not even for a Federal court sitting in admiralty.

It should finally be emphasized that the system presently in effect fully permits employer railroads to recoup their losses from negligent third parties through contracts of indemnification or lawsuits seeking contribution, and is in no sense inequitable.[3] The court in *Coats*,

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[3]In the Annotation at 6 A.L.R.3d 1307 ("Claim, for Contribution or Indemnity Against Joint Tortfeasor, or Employer Liable to Employee Under Federal Employers' Liability Act, as Affected by Contributory Negligence of Employee"), the extent to which American railroads have been able to recoup any losses attributable to third-party negligence under the present legislative scheme is made clear. This Annotation also makes clear the pervasive extent to which the American railroad industry has been able to protect itself from liability for third-party negligence through contract: "To provide assurance of contribution or indemnity from the other party under such circumstances, employers who are subject to the provisions of the FELA often obtain agreements from their customers, especially in connection with spur track arrangements, that the customer will provide contribution or indemnity to the employer if the employer becomes liable for certain injuries. The contract is likely to provide for fifty percent contribution or for full

supra, notes that the employer is in a far better position than the employee to contractually protect itself from the economic burden resulting from third-party negligence. The court states, *supra* at 1138-1139:

> Furthermore, contractual allocation of risk by private parties better accomplishes the goal of allocating risk. Private parties, rather than courts, are better able to assess the risks of non-collection and to decide who is in the best position to collect a judgment. Sophisticated maritime parties, intertwined in contractual relationships, can usually foresee the risk of insolvency and can allocate or insure against it. For example, Penrod [the employer] and MIS were in a position to address the risk of insolvency when they wrote their contract. Coats [the employee] had no such "bargaining" position. Indeed, "where potential co-defendants can contract in advance regarding their apportionment obligations among themselves, rules that leave both traditional joint and several liability and traditional apportionment rights in place might create optimal incentives and be consistent with equitable concerns." 2 American Law Institute, Enterprise Responsibility for Personal Injury 156 (1991). The rules now in place are clear and easily administered. They leave the allocation of the risks of non-collection to the parties best equipped to evaluate these risks. Absent Congressional intervention, private ordering of the risks is far superior to the proposed effort. Our ability by definition is inferior to the market's ability to tailor and allocate these risks.

It is widely recognized that, at present, virtually all FELA cases settle prior to trial (most before commencement of any suit) and that

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indemnity to the employer, depending upon the nature and interrelationship of the employer's and the other party's negligence."

an expeditious system of recovery is in place. 11 Am. Jur. Trials FELA Litigation § 125. Judicially reshaping the FELA in the manner proposed by the railroad industry would result in many more trials in FELA cases where third-party negligence is also involved, to the detriment of an injured worker's speedy recovery, and imposing an additional and unnecessary burden upon both the state and Federal judiciary.

II. THE POSITION ADVOCATED BY THE RAILROAD INDUSTRY THREATENS TO WEAKEN THE FEDERAL EMPLOYERS' LIABILITY ACT IN NUMEROUS FUNDAMENTAL RESPECTS.

The facts at the core of this specific litigation, involving toxic inhalation over a period of many years, and claims by the employer that much of this toxic exposure resulted from causes other than railroad work, are not representative of the typical FELA action where principles of joint and several liability are applied. As discussed above, application of the principle that an employer railroad is liable for all damages caused in whole or in part by its negligence (save for damages caused by contributory negligence attributable to the employee) typically arises in a context where a railroad worker has been injured when sent by his employer to work upon unsafe property or equipment owned by another railroad or industry, or is hurt because of the negligent acts of third parties to whom he has been exposed by his employer, while performing the duties of his employment.[4] Despite the unusual facts of this case, the railroad industry has seized upon this litigation as a vehicle to attempt to negate and undermine central Congressional objectives behind the FELA in *all* FELA actions. In addition to overturning the principle of liability which has been at the core of the FELA for nearly a century, adoption of the position advocated by the railroad industry

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[4]The proper application of joint and several liability principles under the facts of this specific case is discussed in Respondent's briefing, and will not be reiterated here.

would abrogate numerous other important rights and protections which Congress intended to provide to injured railroad workers under the Federal Act.

A. The Position Advocated by the Railroad Industry Would Negate Congress' Intention to Create a Uniform Right and Remedy for Injured Railroad Workers, and Make Their Recovery Dependent Upon the Vagaries of State Law.

One of the principal objectives of Congress in enacting the Federal Employers' Liability Act was to secure both uniformity of right and remedy of injured workers employed by railroads engaged in interstate commerce. *Chicago M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041 (1926); *New York C. R. Co. v. Winfield*, 244 U.S. 147, 150, 37 S.Ct. 546, 61 L.Ed. 1045 (1917). As stated by the Supreme Court of Missouri in *Graham v. Thompson*, 357 Mo. 1133, 212 S.W.2d 770, 773 (1948), *cert. den.* 335 U.S. 870, 69 S.Ct. 166, 93 L.Ed 414 (1948):

> The underlying basic reason for the enactment of the Federal Employers' Liability Act was to secure uniformity of both right and remedy in interstate commerce cases without regard to whether the action is brought in any state or in any Federal court. . . . To obtain such uniformity in all courts there had to be a dominant statute. Its purpose was to supplant the numerous state statutes and their varying applications in each state as to who could recover, against what railroad and under what circumstances. Congress chose to and did enact such a dominant statute. The Federal Employers' Liability Act "withdrew all injuries to railroad employees in interstate commerce from the operation of the varying state laws" and put all such actions under a national law of uniform operation in all states. *New York Central R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 547, 61 L.Ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139.

The position advocated by the railroad industry in this case would essentially destroy the national uniformity intended by Congress in enacting the FELA. In a broad category of cases, state law regarding issues of negligence and causation would once again become central to a railroad worker's ability to receive full compensation for his injury. An injured worker's right to recover in cases where third-party negligence was involved would come to vary from state to state, depending upon where his accident occurred. Certain common law impediments to recovery – which Congress intended to eliminate in enacting the FELA – would once again become dominant in railroad personal injury litigation. This is exactly the result Congress desired to avoid in establishing the FELA. As stated by the United States Supreme Court in *Winfield*, *supra at* 150, 547: "(I)t is not conceivable that Congress 'intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk,'" in actions brought under the FELA. (*Citing Seaboard Airline R. Co. v. Horton*, 233 U.S. 492, 501, 34 S.Ct. 635, 58 L.Ed. 1062 (1914)).

B. The Position Advocated by the Railroad Industry Would Effectively Eliminate the Railroad's Continuing, Non-delegable Duty to Provide Its Employees With a Safe Place to Work Under the FELA.

One of the central purposes of Congress in enacting the Federal Employers' Liability Act was to promote safety within the railroad industry. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958). To this end, the United States Supreme Court has recognized that the FELA imposes upon railroads engaged in interstate commerce a continuing, non-delegable duty to provide their workers with a safe place in which to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). As stated by the United States Supreme Court in *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671, 10 L.Ed.2d 709 (1963):

> (A) railroad has the non-delegable duty to provide its employees with a safe place to work even when they are required to go on to the premises of a third party over which the railroad has no control. *See Kooker v. Pittsburgh & Lake Erie R. Co.*, 6th Cir., 258 F.2d 876; *Chicago Great Western R. Co. v. Casura*, 8th Cir., 234 F.2d 441; *Beattie v. Elgin, J. & E. R. Co.*, 7th Cir., 217 F.2d 863. These decisions are in accord with the opinions of this Court in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444; *Ellis v. Union Pac. R. Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 21, reversing 168 Ohio St. 582, 156 N.E.2d 822. . . . We hold that the B&O had a duty to inspect P.E. cars before permitting its employees to work with them.

The scope of a railroad's continuing, non-delegable duty to provide its employees with a safe place in which to work is noted in 11 Am. Jur. Trials, FELA Litigation, §§ 17, 18:

> It is recognized that the Federal Employers' Liability Act imposes on railroads a continuing non-delegable duty to use reasonable care to furnish the employee a safe place to work. This is a duty that becomes more imperative as the risk increases. *Bailey v. Central Vermont R. Co.* (1943) 319 U.S. 350, 87 L.Ed. 1444, 63 S.Ct. 1062.
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> . . .
>
> This duty on the part of the carrier continues even when the carrier requires its employees to go upon other premises to work, so that the carrier may be held liable for breach of the duty even though the defect was in premises over which the railroad had no control. *Ellis v. Union Pac. R. Co.* (1947) 329 U.S. 649, 91 L.Ed. 572, 67 S.Ct. 598; *Harris v. Pennsylvania R. Co.* (1959) 361 U.S. 15, 4 L.Ed.2d 1, 80 S.Ct. 22; *Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1, 10 L.Ed.2d 709, 83 S.Ct. 1667. (Other citations deleted.) . . . Thus, the employer has a duty to inspect the premises of the third party before permitting his employee to work there, and may be held liable if it fails to make such an inspection and the employee is injured. *Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1, 10 L.Ed.2d 709, 83 S.Ct. 1667.

The continuing, non-delegable duty imposed under the FELA is made meaningful through the principle that employer railroads are deemed fully liable for all damages caused in whole or in part by their negligence, save those damages caused by the worker's contributory negligence. If adopted, the position advocated by the railroad industry would, in practical terms, mean that railroads no longer have a continuing, non-delegable duty to provide their employees with a safe place to work, but could avoid liability by shifting the blame to others. An already dangerous industry would become even more hazardous.

C. The Position Advocated by the Railroad Industry Would Undermine the Broad, Statutorily Unique Discretion Afforded to Injured Railroad Workers Under the FELA With Regard to Selection to Forum.

The right of an injured railroad worker to selection of forum under the FELA has long been regarded as an important, fundamental right afforded by Congress under the Act. Congress recognized that it would be unduly burdensome for railroad workers, frequently called upon to perform their duties in states far away from their homes, to be required to maintain suit where the accident occurred. A liberal venue provision was accordingly established under the FELA, providing injured railroad workers with broad and statutorily unique discretion in determining the forum in which their action will be tried. 45 U.S.C. § 56 provides in relevant part:

> Under this chapter, an action may be brought in a district court of the United States, in the district of the residence of

the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

The United States Supreme Court has recognized that under the FELA, choice of venue is a substantial, substantive right afforded by Congress to injured railroad workers. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263, 70 S..Ct. 26 (1949).

In establishing the liberal venue provisions of the FELA, Congress explicitly recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes." *Baltimore & O. R. Co. v. Kapner*, 314 U.S. 44, 49-50, 62 S.Ct. 6, 8, 86 L.Ed. 28 (1941), *citing* Senate Report No. 432, 60 1st Cong., 2d Sess. p. 4. If the position advocated by the railroad industry were adopted, injured railroad workers would, in a large class of cases, be forced to maintain suits at distant locations where their employers required them to work in order to obtain jurisdiction over potentially negligent third parties. Congress' intention to permit injured railroad workers to choose their legal forum would be effectively defeated.

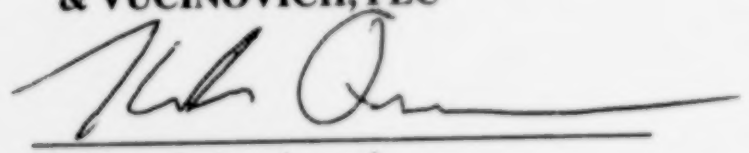
Congress clearly recognized that requiring injured railroad workers to bring suit in distant forums would, in many instances, be so impractical and cost prohibitive as to render the employee's right to recovery illusory. 45 Cong. Rec. at 4034-4035 (1910). For nearly a century, there has been no requirement that FELA claimants be forced to travel to distant locations to obtain full recovery for their injuries. This would no longer be true if the position advocated by the railroad industry were adopted.

CONCLUSION

Abolition of century-old joint and several liability principles central to the Federal Employers' Liability Act, as advocated by the railroad industry, would not simply destroy the system of liability which is at the core of the Act, but would disturb virtually every aspect of Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the FELA. The railroad industry is attempting to utilize this case as a vehicle to fundamentally alter the governing principles of the FELA, and to limit the rights of employees hurt on the job, an objective it has not been able to accomplish legislatively. The facts of this case do not provide proper basis for this Court to fundamentally refashion the century-old Federal system of compensation enacted by Congress for the protection of injured railroad workers.

Respectfully submitted,

YAEGER, JUNGBAUER, BARCZAK & VUCINOVICH, PLC



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No. 01-963

In the

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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MOTION OF THE UNITED TRANSPORTATION UNION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT FREEMAN AYERS, et al.

NOW COMES Amicus Curiae, The United Transportation Union, in support of respondent, Freeman Ayers, et al., by its attorney, Clinton J. Miller, III, pursuant to United States Supreme Court Rule 37, and moves this Honorable Court for leave to file an Amicus Curiae brief in support of the respondent. In support thereof, The United Transportation Union states:

1. Petitioner, Norfolk and Western Railway Company, through its attorneys, has not provided its consent to the submission of an Amicus Curiae brief in support of the respondent's position. However, respondent has provided his consent.

2. Amicus Curiae, the United Transportation Union, is a labor union representing railroad transportation operating employees on every major railroad in the United States. The railroad operating employees represented by the United Transportation Union rely on the protection of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (West 2000), to compensate them for on-the-job injuries or death.

3. Respondent and others filed a cause of action against petitioner pursuant to the FELA due to injuries sustained as a result of exposure to asbestos. After a jury verdict in favor of respondents, the petitioner claimed error on several grounds, including contending that it is entitled to an apportionment of fault among tortfeasors in order to reduce its liability to respondents. The trial court rejected this contention and the petitioner then sought review.

4. Amicus Curiae United Transportation Union is especially concerned that the petitioner is attempting to subvert nearly one hundred years of statutory and case law under the FELA by attempting to limit its liability pursuant to common law principles of apportionment of fault. This Court has never ruled that a railroad employee must look to parties other than his or her employer to receive full, fair, and just

compensation. Should the Court hold that apportionment principles do apply under the FELA, all railroad workers in this country will be left with an uncertain and incomplete remedy for injury or death that results while engaged in interstate commerce for the various railroads.

WHEREFORE, Amicus Curiae, The United Transportation Union, respectfully prays that this Honorable Court grant it leave to file an Amicus Curiae brief support of respondent.

Respectfully submitted,

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45 U.S.C. § 51 2

STATEMENT OF INTEREST OF AMICUS CURIAE UNITED TRANSPORTATION UNION

Currently, over 100,000 men and women in this country are working or retired members of the United Transportation Union. On a daily basis, the active members of the United Transportation Union place their own safety at risk in order to expedite interstate commerce on every major railroad in the United States. The work done by these dedicated employees is absolutely essential to maintaining the free flow of interstate commerce. Members of the United Transportation Union are directed by railroad employers with respect to when, where, and how to perform their work. Railroad employers then profit from this direction and labor. A review of the website for the Association of American Railroads ("AAR"), a lobbying group on behalf of railroads and railroad management, reveals that net income for Class I railroads exceeded two and one-half billion dollars in 2001.

Although efforts are constantly being made to improve railroad safety, history has demonstrated that the day-to-day operation of freight and passenger trains is very demanding and often dangerous. For example, in 1995, there were 1,114 rail-related fatalities and 10,795 rail employee fatalities/injuries. Enhancing Rail Safety Now and Into the 21st Century: The Federal Railroad Administration's Safety Programs and Initiatives, A Report to Congress, October 1996. However, the Association of American Railroads notes on its website that the railroad accident rate has fallen by thirteen percent since 1990 and sixty-four percent since 1950 and the injury and illness rate has fallen fifty-five percent since 1990 and sixty-nine percent since 1980. The Federal Railroad Administration report on Enhancing Railroad Safety published in October 1996 (and located on the FRA's website) confirms these declines in accident and injury rates. In fact, the AAR now claims that railroads have become one of the nation's safest industries. Part of the credit for this safety record is no doubt due in part to the liability scheme established by Congress under the FELA which encourages railroads to act safely for the protection of their employees regardless of where those employees are or with whom they

are working. Although railroad safety has improved, the thousands of railroad workers injured or killed each year continue to deserve the protection afforded by Congress and should have to look no further than their employer for full, fair and just compensation.

Under the compensation system created by Congress nearly one century ago, railroad workers who are engaged in interstate commerce are not entitled to workers' compensation benefits. Their only remedy for job related injuries is under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.; Johannessen v. Gulf Trading & Trans. Co., 633 F.2d 653 (2d Cir. 1980). This remedy, however, is not available without proof. A railroad employee seeking to recover his lost wages and other damages for a job related injury must prove the traditional elements of negligence and causation before he or she can recover. Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990). Although the FELA may not be a perfect remedy, it is the remedy that was created by Congress in the early nineteen hundreds as a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." Sinkler v. Missouri Pacific R. Co., 356 U.S. 326 (1958). In enacting the FELA, Congress intended to craft "a federal remedy that shifted part of the 'human overhead' of doing business from employees to employers." Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994). Allowing a railroad to limit its liability based upon apportionment of fault, as suggested by the Norfolk and Western in this case, would significantly diminish the safety incentives created by Congress and placed squarely upon the employer and employee.

The purpose of the FELA is to equitably allocate the inevitable cost of human injury associated with the railroad industry. Urie vs. Thompson, 337 U.S. 163, 181 (1946). The United States Supreme Court has consistently held that the Act is meant to provide a broad remedial framework for injured railroad workers and should therefore be construed liberally to effectuate its humanitarian and remedial purpose. Id.; Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987).

In enacting the FELA, Congress intended to provide a uniform compensation system that would apply to all railroad workers who are injured on the job, regardless of the location of the injury and independent of state common law or state workers compensation systems. The FELA is vital to the ability of railroad workers to safely and efficiently perform their duties. It was Congress' intent to provide broader protection for FELA employee plaintiffs than typical common law plaintiffs because the FELA is a work-related compensation statute. Allowing a railroad to seek protection behind principles of apportionment of fault would not only subvert Congressional intent, but destroy the uniform compensation scheme and the broad remedial framework under the FELA. The average railroad worker would be forced to look to parties other than his or her employer for compensation. The worker will then be faced with the prospect of partial recovery when faced with the myriad common law limitations on recovery against non-railroad defendants, including the various immunities afforded governmental entities whose conduct might contribute to cause harm to the worker.

If the N and W's position is adopted, tens of thousands of railroad employees who are engaged in interstate commerce by rail will be exposed to the risk of harm without the ability to receive compensation for their on-duty injuries. This negative impact on the rights of FELA plaintiffs is of vital interest to the United Transportation Union. The perspective of amicus curiae UTU will complement that of respondents and will provide assistance to this Court in construing the FELA and deciding the issues presented.

SUMMARY OF ARGUMENT

I.

UTU supports the recovery of damages for both physical and emotional injury by injured rail employees including the fear of cancer. UTU has not briefed this issue since it will be fully addressed by Respondents and other

Amici Curiae. Rather, UTU will focus on the significant unfair impact of Petitioner's "proportionate fault" argument.

II.

The concept of proportionate fault seriously undermines the clear Congressional intent to provide full compensation to injured rail workers pursuant to the FELA. The entire cost of railroad injuries under the FELA are to be equitably adjusted between the worker and the railroad.

Petitioner's concern over the award is solely a damages issue. That concern should not be addressed as a liability issue by means of proportionate fault. The FELA statutory language "in whole or in part" refers to the railroad's total responsibility for all damages sustained, as a result of any railroad negligence, during railroad employment. That total responsibility can be diminished only by an employee's comparative negligence.

Damages issues, similar to those presented by the jury verdicts in favor of Ayers and Butler, are handled routinely in the courts. The damages issue here is no different than a back injury claim wherein a defendant/railroad presents evidence of a preexisting condition or injury or evidence of a subsequent back injury or condition. There are no issues of negligence or fault with regard to the preexisting condition or unrelated post-injury condition.

In FELA cases, a jury typically decides these damages issues, receiving proper instructions which embody principles similar to the following aggravation instruction:

> If you find that there was such an aggravation, you should determine, if you can, what portion of plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Devitt, Blackmar & Wolff, Federal Jury Practice & Instructions, Vol. 3, 85.03 (4th ed. 1987). The Ayers and Butler damages issues should be resolved on those principles. More importantly, UTU is primarily concerned with the serious and disastrous impact of "proportionate fault" on the right to full and fair compensation for injured rail workers under the FELA.

ARGUMENT

PROPORTIONATE FAULT UNDERMINES THE STATED PURPOSE OF THE FELA TO ADJUST THE EXPENSE OF RAIL INJURIES BETWEEN THE WORKER AND THE RAILROAD

For nearly 100 years, this Court and many other federal and state courts have recognized the clear remedial purpose of FELA legislation. The unbroken line of FELA jurisprudence establishes that the human cost of railroad injuries must be borne by the railroad-employer and diminished, if at all, only by employee comparative negligence. The employee has the right to look to his employer only where the employer's negligence causes, in whole or in part, injury to that employee. The Norfolk and Western proportionate fault position undermines that fundamental purpose of the Act.

In Sinkler v. Missouri Pacific R. Co., 356 U.S. 325 (1958), this Court observed:

> . . . in interpreting the FELA, we need not depend upon common-law principals of liability. This statute, an avowed departure from the rules of the common law, cf. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507–509, 77 S. Ct. 443–450, 1 L.Ed. 2d 493, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed. 61. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. Kernan v. American Dredging Co., 355 U.S. 426, 431, 438, 78 S.Ct. 394, 401, 2 L.Ed. 382. The Senate Committee

> which reported the Act stated that it was designed to achieve the broad purpose of promoting 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden' S.Rep. No. 460, 60th Cong., 1st Sess. 3.

Sinkler, 356 U.S. at 337. Railroad workers today travel daily across state lines, perform switching on industry property, interchange thousands of railcars owned by many different corporations, operate and work on locomotives owned by different railroads, traverse track maintained by outside companies, use equipment manufactured, owned, maintained or leased by others, are transported in independent, hired taxi vehicles at away from home terminals, and are housed overnight at lodging designated by their employers but owned and operated by others. That is just a brief sampling of the vast interconnected railroad enterprise experienced by our UTU employees every day.

Proportionate fault will open a "Pandora's Box" of potential wrongdoers (both real and illusory) for most rail injuries. When an injured railroad employee looks to his employer for compensation, that recovery will be shrunk by his employer's contention that its fault is diminished by the ownership of the railcar by someone else, the maintenance of the track by another party, the land owned by an industry or the taxi operated by another. Employees would be subjected to a merry-go-round of claimed potential wrongdoers, different state laws and defenses, potential insurance limits, a wide array of contractual arrangements, and liability or damages limitations. This list can go on and on. The difficulties of proof would be overwhelming, futile, unquestionably expensive, and time-consuming. The necessity of suing every possible tortfeasor would needlessly increase the cost and expense of litigation and would create a litigation explosion in our state and federal courts.

The goal of national uniformity of recovery for injured railroad workers would evaporate. See Dice v. Akron, Canton and Youngstown R.R. Co., 345 U.S. 811 (1951). It would disappear into the patchwork of 50 schemes of proportionate fault in the 50 states.

The purpose of the FELA is to provide a remedy for those who are helpless to provide for their own safety. Employee injury costs, an "inescapable expense of railroading," must be borne by employers who profit from that enterprise. Proof of employer negligence and causation is required and responsibility is "equitably adjusted" between railroad and worker by means of comparative negligence. This is fair and consistent with long established statutory construction of the FELA.

It is the employer who can adjust his charges, raise his shipping rates, choose his independent contractor, contract with private industry, write indemnification agreements adequately, and otherwise protect itself from the costs of employee injury. Congress understood that an employee cannot do that. Congress passed the FELA so that the entire costs of injury, caused in whole or in part by employer negligence, is divided equitably between employer and employee. That is the spirit and intent of this legislation. It is also the consistent statutory interpretation of the FELA by this Court and many others. The fact Congress has never amended the statute to alter this equitable division of injuries between employer and employee reinforces the fact that this interpretation is consistent with the intent of Congress. Moenssens S.W. R.R. v. Morgan, 486 U.S. 330 (1988).

It is a bedrock principle of FELA law that a railroad employer has a non-delegable duty to provide a safe place in which to work. Shenker v. B&O R.R., 374 U.S. 1 (1963). This duty would be trivialized to the point of non-existence by proportionate fault. A good example of the importance of this principle to injured railroad employees is Payne v. B&O R.R., 309 F.2d 546 (6th Cir. 1962). In Payne, the defendant railroad attempted to avoid liability by arguing that its employee's injury occurred on the property of an industry (SUCO) and that pursuant to a contract between the railroad and the

industry, the industry had the duty to maintain the track. The Sixth Circuit correctly noted:

> . . . Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk not the employee.

Id. at 548 (emphasis added). Clearly, under proportionate fault, a railroad would be able to delegate its responsibility, and blame industries, equipment owners, or any outside party, known and unknown to the injured employee, in an effort to diminish or extinguish its fault. This is contrary to the clear intent of FELA to allocate the human cost or overhead of the railroad enterprise equitably between the employer and employee.

Another good example of the injustice which could be inflicted upon railroad employees is Cazad v. C&O Railway Co., 622 F.2d 72 (4th Cir. 1980). Cazad was a CSX employee injured while performing railroad service on the property of Union Oil in West Virginia. He stepped into an uncovered drain culvert located about four to six feet from the track and sustained serious and disabling injuries. The injured railroad employee's claim against Union Oil was dismissed since, pursuant to West Virginia law, a landowner has no duty to warn persons of dangerous conditions which are open and obvious nor take steps to obviate such hazards. However, C&O's liability under the FELA was an entirely different matter. The decision noted that C&O had a non-delegable duty to provide its employees with a safe place to work even when required to go on property owned by third-parties. For Cazad, FELA provided a complete remedy for his injuries regardless of any proportionate fault by Union Oil and regardless of varying state law doctrines. Clearly, the historical remedial purpose of the FELA to provide a full remedy to employees negligently injured in the course of their employment, caused in whole or in part by employer

negligence, would be frustrated if the employer were able to diminish its liability by the fault of the landowner.

This Court in Shenker, supra., also recognized the danger of allowing railroads to shift blame to others wherein it observed:

> If recovery were denied in this case, the railroads by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk.

Shenker, 374 U.S. at 11. Countless cases interpreting the FELA have uniformly found a statutory construction and purpose that permits an employee to recover for all his injuries caused, in whole or part, by employer negligence. Proportioned fault renders those decisions meaningless and ineffective. This position was plainly stated in Rice v. Cincinnati, New Orleans & Pacific Railway Co., 920 F. Supp. 732 (E.D.Ky. 1996). There, an injured railroad employee brought suit against his employer under the FELA for injuries sustained in a crossing collision with a motor vehicle. The court, quoting other decisions, noted:

> FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of the fault of any third person. Liability is thus imposed upon the carrier for all damages sustained by its employee except any part attributable to the negligence of the employee, if the injury is wholly or partly caused by the railroad's negligence. . .

Id. at 735.

N and W's Brief identifies so-called "trends" of the common law that allegedly support proportionate fault. Suffice it to say, none of these purported trends involve FELA cases or work-related injury claims between employee and employer. FELA is a statute which is an avowed departure from the common law. There is nothing more fundamental to that departure than the legislative decision to place the sole burden of employee injuries upon the employer.

A railroad employer's liability is similar to joint and several liability. As recognized in

McDermott v. AmClyde, 511 U.S. 202, 221 (1994), joint and several liability applies:

> When the plaintiff's recovery from other defendant's is limited by factors beyond plaintiff's control, such as defendant's insolvency. When the limitation on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendant's, rather than an innocent plaintiff, responsible for the shortfall.

Under the FELA, Congress decreed by statute that the employer is fully responsible in damages whenever its negligence, either wholly or partly, causes injury to an employee. The railroad employer, not the employee, takes the risk of any "shortfall."

FELA embodies the same principles Congress intended for longshoremen injuries. In Edmonds v. Companies General Transatlantic, 443 U.S. 256 (1979) this Court reversed a proportionate liability ruling diminishing the recovery of an injured longshoreman. There, this Court observed the fundamental flaw of a proportionate fault approach in work-related injury cases; specifically, "there will be many circumstances where the longshoremen will not be able to recover in any way the full amount of the damages determined in his suit against the vessel." Id. at 269.

This Court should decline to alter the longstanding statutory construction of the FELA that the entire cost of employee injury be equitably divided between employer and employee. UTU members today, who daily encounter numerous situations involving other parties, must be able to look to their respective employer for full damages where employer negligence plays any part, no matter how small, in bringing about the injury.

The concerns raised by N & W, particularly relating to the claims of Ayers and Butler can be, and should be, fairly decided based on existing damage principles regularly applied in many other FELA cases.

It must be recognized that because of the nearly 30 year delay between employment exposure and the discovery of injury, the Ayers and Butler claims are relatively unique. "In whole or in part" as applied to Butler's claim simply means that, upon proof of any negligence by N & W, the employer is 100 percent responsible (less employee contributory negligence) for the employment related injury. It does not matter that, during those three years of employment, N & W can show that the work related exposure was partially the result of a joint tortfeasors' negligence or fault. FELA renders a negligent railroad fully responsible for the injury caused during those three years.

How to measure the damages for those three years is the real issue. It is not a liability or proportionate fault issue. A trial jury should be allowed to hear all the evidence bearing on the Respondent's lung condition, including his exposure to asbestos after he left rail employment. Just as in pre-existing condition cases (i.e. such as an arthritic back) the jury, even in the absence of a clear divisibility of injuries or exposure, must be allowed to decide the issue. As the pattern instructions suggest, if the jury can "determine . . . what portion of Plaintiff's condition resulted" from the negligent exposure at N & W, "make allowance in your verdict only for the" condition caused by the negligent exposure. However, "if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, . . . make allowance in your verdict for the entire condition."

Devitt, Blackmar & Wolff, Federal Jury Practice & Instructions, Vol. 3, 85.03 (4th ed. 1987). Juries, without the certainty of mathematical precision, percentage findings, or specific expert testimony, render similar judgements on the amount of damages everyday.

CONCLUSION

The proper manner in which to assess N & W's contentions is to decide this as a "measure of damages" issue. The concern of the railroad employer can be fairly addressed consistent with established case law. More importantly, this Court should reject the proportionate fault scheme which is unfair to railroad workers and contrary to the plain language and legislative intent of FELA and reaffirm that the railroad workers of this country need only look to their railroad employer for full, fair and just compensation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et. al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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BRIEF *AMICI CURIAE* FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF THE RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women, and the Academy of Rail Labor Attorneys, a professional association of attorneys who represent railroad employees in Federal Employers' Liability Act cases, file this *amici curiae* brief in support of Respondents with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

I. Under the common law, a plaintiff who pleads and proves that a defendant has negligently caused him to suffer a physical injury in the form of a disease (here, asbestosis) may recover, as an item of an overall damages claim, compensation for fear of contracting a future disease (here, cancer), so long as that fear is reasonable and is attributable to the same negligent act that caused the first disease. There is no further requirement that the fear be of such a nature as to generate a second physical injury, such as chronic nausea or the like. The Restatement (Second) of Torts, which distills the common law tort cases on this point, expressly so states, and it does so on the basis of common law precedents stretching back to at least the 1880's and continuing to the present. The Petitioner, while relying heavily in its argument on portions of the Second Restatement that state the elements that must be proven where the defendant's negligence has caused a purely emotional injury, quite simply ignores the section of the Restatement that directly applies to the situation here, where the negligence has caused a physical injury such as a disease, and that belies the Petitioner's position.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

II. Joint and several liability, which makes each of two persons whose tortious conduct is a cause of harm to another liable for the entire harm, has been applied in this country since at least the 1880's as the common law—and as the admiralty law—rule of liability for multiple tortfeasors causing a single indivisible physical injury, and is the rule of law stated in both the First and Second Restatements of Torts. Joint and several liability was the dominant rule of liability for indivisible harms throughout the twentieth century, and continues to be applied as federal common law in negligence frameworks similar to FELA. And, while the past three decades has seen changes of various kinds to the State laws of multiple tortfeasor liability, generally through legislative action, contrary to the Petitioner, these changes have not constitiuted a movement from the joint and several liability rule to the several liability rule that the Petitioner advocates for FELA.

ARGUMENT

Mindful that this Court has historically taken common law tort principles into account in resolving Federal Employers' Liability Act ("FELA") questions like the two questions presented in this case, the Petitioner Norfolk & Western Railway Company bottoms its arguments to this Court on an account of the common law tort principles that the Petitioner claims are relevant to, and should thus inform, the decision of this case.

In what follows we show: *first*, that the Petitioner's argument on the first question presented (which goes to the recovery of damages for fear of cancer in a personal injury negligence case), ignores the relevant common law rule and invokes an inapposite common law rule; and, *second*, that, the Petitioner's argument on the second question presented (which goes to the liability to a plaintiff of multiple negligent tortfeasors), fundamentally misstates the common law

liability rules at the time FELA was enacted and the nature of the evolution of these liability rules in recent years.[2]

I. THE DAMAGES ISSUE

A. To put the damages issue in its proper context, we begin by describing the cause of action the plaintiff-respondent railroad employees pleaded and proved and how and where the claim for fear-of-cancer damages entered the case.

The employees initiated this suit by pleading each of the familiar elements of a standard personal injury negligence cause of action. Those elements are "[1] duty . . .; [2] breach . . .; [3] causa[tion] . . . [and] [4] injury"—with the injury in a standard personal injury case being, of course, a physical injury. W. Prosser, *Prosser on Torts* §§ 30, 54 (4th ed. 1971). *See also Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 550-51 (1994) (noting that elements of "breach of duty, injury, and causation" must be satisfied to state a FELA negligence cause of action).

To prove those elements at trial, the employees introduced evidence to the effect [1] that the defendant-petitioner railroad owed a duty to conform to a reasonable standard of care to protect its employees from bodily harm; [2] that the defendant breached that duty by negligently exposing plaintiffs to harmful asbestos dust and fibers; and [3] that defendant's negligence was a cause of [4] a *physical injury* to the plaintiffs, in that each plaintiff was not merely exposed to asbestos, but contracted the disease of asbestosis and suffered the physical symptoms of that disease.[3]

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[2] In advancing its position, the Petitioner, of course, does not place its sole reliance on the arguments from the common law we discuss, but rather weaves those together with arguments from FELA and arguments from policy. The Respondents meet and rebut those arguments and we do not retrace the Respondents' steps in this brief.

[3] This Court has held that a slowly-progressing disease contracted by breathing in excessive amounts of harmful materials over a period of time

The employees also set out to prove, as one item of their *damages* claim—and *not* as the fourth element of their personal injury negligence cause of action—that a result of the defendant's tort was that the employees feared they would develop cancer.

For purposes of this Court's consideration of the issues presented on *certiorari*, the Petitioner accepts (albeit reluctantly) that the employees adduced sufficient evidence to sustain the jury's determination that they had made out all four elements of their personal injury negligence cause of action, including the physical injury element. Pet. Br. at 2. The issue here therefore is not—as it was in *Gottshall*, *Metro-North*, or *Urie*—whether plaintiffs have made out a FELA cause of action. That plaintiffs have done so is a given for the purposes of the proceedings in this Court. *See* Pet. Br. at i. Rather, the question is whether the jury should have been permitted to make a compensatory award for the employees' fear of cancer as one item of an overall damages award. The jury was instructed as follows:

> [A]ny plaintiff who has demonstrated a reasonable fear of cancer that is related to proven physical injury from asbestosis is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering. [J.A. 573].

The petitioner attacks this jury instruction, arguing that even where a defendant's negligence causes bodily harm sufficient to make out the "injury" element in a personal

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satisfies the "injury" element under FELA. *Urie v. Thompson*, 337 U.S. 163, 180 (1949) ("silicosis is an 'injury' within the meaning of that term" as used in FELA). *Accord* Restatement (Second) of Torts § 15 (1966) (hereinafter "*Rest. 2d of Torts*") ("illness" constitutes "bodily harm" under common-law tort principles). This Court has also held that where no such disease is contracted, the inhalation of harmful materials is *not* in itself a cognizable FELA injury. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997).

injury negligence cause of action, the plaintiff may *not*, as an item of the damages award for the tort, recover for fright, anxiety, apprehension, humiliation, fear, or other such emotions occasioned by the tort, but instead may *only* recover "pain and suffering" damages for "sensations stemming directly from a physical injury or condition." Pet. Br. at 15, 16.

Based on that premise, the Petitioner contends that in order for a plaintiff to recover for any emotional harms other than the painful sensations radiating from the injured or diseased body part—*viz.*, harms such as fear or anxiety over a potential future medical condition or over an early death—the plaintiff must plead and prove both a personal injury negligence cause of action *and* "the independent tort of negligent infliction of emotional distress." Pet. Br. at 10, 15-16. And, the Petitioner emphasizes that according to the Restatement (Second) of Torts, ("*Rest. 2d of Torts*") one of the elements of that independent tort is that the emotional distress be of such a nature as to generate "'substantial bodily harm' as a result of the emotional injury, such as 'long continued nausea' or 'repeated hysterical attacks,'" Pet. Br. at 17 (quoting *Rest. 2d of Torts* § 436A, cmt. c), and a second element is that the emotional distress must be the "immediate" result of the actor's negligent conduct and cannot follow from an intervening event such as learning of one's perilous condition from a physician. Pet. Br. at 21 (*citing Rest. 2d of Torts* § 436, cmt. c). From the foregoing, the Petitioner concludes that the jury instruction was defective in not requiring the plaintiffs to prove either element, and the jury verdict must on that account be reversed.

As we now show, the damages instruction given by the trial court here was entirely in accord with longstanding common law principles governing the award of damages in personal injury negligence actions.

B. 1. Although the Petitioner repeatedly invokes sections of the Second Restatement of Torts that are far afield, *see* Pet.

Br. at 16, 18, 21, the Petitioner assiduously avoids citing the section of the Restatement which is directly in point and provides as follows:

> **§ 456. Emotional Disturbance Resulting From an Actionable Injury or the Conduct Which Caused It.**
>
> If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is *also* subject to liability for
>
> (a) fright, shock, *or other emotional disturbance* resulting from the bodily injury *or from the conduct which causes it*, and
>
> (b) further bodily harm resulting from such emotional disturbance. [*Rest. 2d of Torts* § 456 (emphasis added)].

The comments to § 456 explain that "[w]here the tortious conduct in fact results in bodily harm, and makes the actor liable for it, a cause of action is independently established, and there is sufficient assurance that the resulting emotional disturbance is genuine and serious. There may be recovery for such emotional disturbance, *even though the emotional disturbance does not result in any further bodily harm.*" *Rest. 2d of Torts* § 456, cmt. c (emphasis added). And, the comments contrast this rule, applicable in personal injury negligence cases, with the rule applicable where the independent "negligent infliction of emotional distress" tort is being asserted and where the plaintiff therefore is contending that the damages stem *solely* from an emotional injury caused by the defendant:

> Where the tortious conduct does *not* result in bodily harm, there can ordinarily be *no* recovery for mere emotional disturbance which has no physical consequences. (See § 436A). [*Rest. 2d of Torts* § 456, cmt. b. (emphasis added)].

Equally to the point, the comments make clear that the kinds of "emotional disturbance" for which recovery can be

had as an element of damages in a personal injury case are *not* limited to the painful "sensations stemming directly from a physical injury," Pet. Br. at 15-16, but include as well emotions such as "worry" or "grief" over further physical conditions or consequences that might befall the plaintiff as a result of the negligent act. *Rest. 2d of Torts* § 456, cmt. d (stating that plaintiff may recover for "worry," "grief," or "humiliation," as an element of damages in a personal injury case). *See also Rest. 2d of Torts* § 905, illust. 6 ("A seriously wounds B, who fears that the wound will cause death. In addition to damages for the physical impairment of the body and pecuniary loss caused by the wound, B is entitled to compensatory damages for the fear of death"); *id.*, illust. 3 ("A negligently causes B to lose an ear. B is entitled to damages not only for the pain and suffering, but also for the humiliation caused by his appearance").

The comments to § 456 also make it clear that recoverable emotional harms in a personal injury negligence case are not limited to the immediate, reflexive feelings of shock or disturbance that may accompany the victim's first consciousness of an injury. *See Rest. 2d of Torts* § 456, cmt. d (recovery may be had for grief and worry over permanently impaired physical condition even where plaintiff "does not realize until a month after the injury" that condition will be permanent); *id.*, cmt. e (plaintiff may recover for "fright" before injury occurs).

In sum, the common law tort damages rule is that a plaintiff who has pleaded and proved that the defendant's negligent act has caused a physical injury and has caused the injury in a way that tort law has traditionally recognized as giving rise to liability, may recover, *as an item of damages*, compensation for any emotional harms stemming from the same negligent act—without having to prove that those emotional harms caused yet a second physical injury.

2. The rule stated in *Rest. 2d of Torts* § 456 is firmly rooted in the common law cases stretching back at least to the

1880's and continuing to the present. The "Reporter's Notes" to § 456 of the Restatement cites many of the pertinent cases, including those that pre-date the 1908 enactment of FELA, *see Rest. 2d of Torts* § 456, App., and many more cases are cited in the leading treatises on torts and damages. *See, e.g.*, D. Dobbs, *Remedies* § 8.1, at 548 (1971); *id.* 541 & n. 36; C. McCormick, *McCormick on Damages* § 88 (1935) (citing numerous negligence cases prior to and closely contemporaneous with the enactment of FELA for the proposition that a plaintiff may recover as an item of damages in a personal injury case for "reasonable apprehension over the effects of the injury upon his health," as well as for "fear of death").

a. Among the many early cases that form the basis for *Rest. 2d of Torts* § 456, the ones most pertinent here are those where the defendant's negligence caused a bodily injury to the plaintiff and also caused the plaintiff to fear a future illness or health condition, or an early death. An illustrative case in this line is *Halloran v. New England Tel. & Tel.*, 115 A. 143 (Vt. 1921), cited in the Reporter's note to Restatement § 456. In *Halloran*, the trial court admitted, over the defendant's objection, evidence that plaintiff, an accident victim, experienced anxiety after she learned from her physician that by reason of the physical injuries she suffered in the negligently-caused accident, she would be unable to undergo a planned operation that would have given her the opportunity to overcome a pre-existing and otherwise fatal "malignant disease of a private nature." 115 A. at 144. The Vermont Supreme Court affirmed the trial court, holding that where anxiety as to the state of one's future health results from a negligently-caused accident that also produces a physical injury in the plaintiff, such anxiety is a "proper element of recoverable damages." The court added:

> It is under this rule that fear of hydrophobia (*Godeau v. Blood*, 52 Vt. 251 [1880]), apprehension of insanity (*Walker v. Boston & Maine R.R.*, 71 N.H. 271, 51 A. 918 [1902]), dread of blood poisoning (*Butts v. National Exchange Bank*, 99 Mo. App. 168, 72 S. W. 1083 [1903]), fear of giving birth to a deformed child (*Prescott v. Robinson*, 74 N. H. 460, 69 A. 522 [1908]), dread of death from swallowing glass (*Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 [1905]), are admitted as proper elements of damage. It is to be observed that mere regret, disappointment, or vexation are not mental suffering within the meaning of the rule (*Bovee v. Danville*, 53 Vt. 183 [1880], but fear, worry and apprehension are typical sorts of it. *Egan v. Middlesex, etc., R. Co.* (D.C.) 212 F. 562 [1913]. [*Halloran*, 115 A. at 144 (emphasis added)].

As the above-quoted passage indicates, in 1921 there was already forty years of authority behind the proposition that fear and anxiety relating to a future condition—and not merely pain and suffering occasioned by the sensations emanating from an injured body part—constitute recoverable "elements of damages" in a personal injury case.

One recurring set of cases in which that proposition came into play were those involving persons injured by dog bites who then feared that they might one day contract hydrophobia (rabies) or lockjaw. In some of the dog bite cases, the plaintiff presented evidence that the dog was rabid, *see, e.g., Buck v. Brady*, 73 A. 277, 280-81 (Md. 1909), and in others, the plaintiff presented evidence to the effect that, because the dog was not available to be tested, there was a risk that the dog might have been rabid and that the plaintiff might contract rabies, *see, e.g., Godeau v. Blood*, 52 Vt. 251 (1880). In *both* types of dog bite case, the courts permitted the plaintiff to recover damages for his fear of rabies or lockjaw, even where there was no evidence to suggest—and no instruction to the jury that it must find—that the fear or

apprehension was of such a nature as to generate physical symptoms.[4]

Moreover, as the passage quoted *supra* at 8-9 from *Halloran* makes clear, the principle that fear is a proper element of damages was applied in a wide range of circumstances in the common law period preceding and closely contemporaneous with the enactment of FELA. *See, e.g.*, *Butts v. National Exchange Bank*, 72 S.W. 1083 (Mo. App. 1903) (fear of blood poisoning from injury caused when iron post pierced skin of plaintiff's foot); *Watson v. Augusta Brewing Co.*, 52 S.E. 152 (Ga. 1905) (damages awarded for reasonable fear of untimely death from ingestion of shards of glass); *Goebel v. Fleming*, 13 Tenn. App. 473 (1931) (damages properly awarded for fear of death while hospitalized for injury, even though by time of trial plaintiff's condition no longer potentially fatal).[5]

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[4] *See Godeau, supra*, 52 Vt. at 251, 254-55 (upholding instruction to jury that "because one who had received [a bite] by a dog, not known to be rabid, would sometimes after a considerable time die of hydrophobia," jury could award damages for "apprehension" and "anguish" over the possibility of contracting rabies); *Warner v. Chamberlin*, 30 A. 638 (Del. 1884) (fear of rabies proper item of damages); *Buck v. Brady*, *supra*, 73 A. at 279 (bitten plaintiff could recover for fear of rabies based solely on testimony that, after receiving bite, she feared contracting rabies); *Heintz v. Caldwell*, 9 Ohio C.D. 412 (1898) (reversible error *not* to allow plaintiff to testify she fears rabies and lockjaw after being bitten by defendant's dog); *Ayers v. Macoughtry*, 117 P. 1088 (Okla. 1911) (proper to instruct jury that "in determining such amount [of damages] you may take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results").

[5] Still another set of recurring negligence cases are those where a pregnant woman who, after suffering a bodily injury, fears she will miscarry (or give birth to an unhealthy baby), and who does not in fact miscarry but instead gives birth to a healthy baby. In those cases, the courts permit testimony regarding—and recovery as an item of damages for—the fear obtaining between the date of the tort and the birth of the healthy baby. *See, e.g.*, *Bowley v. Duca*, 120 A. 74 (N.H. 1923) (damages properly awarded for fear of miscarriage; baby was born healthy).

b. The more recent common law cases are to the same effect. In *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958), for example, a negligent x-ray treatment by a series of radiologists caused the plaintiff a physical injury—burning, blistering, and dermatitis—and she sought, as an element of damages, to recover for the fear of cancer she began to experience two years after the exposure, when a dermatologist to whom she was referred told her that the burn put her at risk. The fear took the form of "purely mental suffering arising from [the] information the plaintiff received from a doctor." *Id.* at 252. The New York Court of Appeals held that the fact that the plaintiff had received a bodily injury antecedent to her fear provided a sufficient "guarantee of genuineness" to distinguish the case from various negligent infliction of emotional distress cases where no injury was shown and no recovery permitted, and provided as well an assurance that that the class of plaintiffs able to recover for fear of cancer would not be unduly broad. *Id.*

In *Hayes v. New York Central Railroad Co.*, 311 F.2d 198 (2d Cir. 1962), the Second Circuit applied the same principle in a FELA case brought by a worker who suffered frostbite (but with no amputation) by reason of the railroad's negligence. The Second Circuit held that it was proper for the jury to award, as one component of the plaintiff's damages, a sum to compensate him for the "fear and anxiety which plaintiff experienced in knowing of the ever-present threat of amputation." *Id.* at 201. *See also Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Pa. 1951) (awarding damages for fear of cancer).

More recently still—and of most particular pertinence here—the court in *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. App. 1986), an asbestosis/fear-of-cancer case on all fours with this one, carefully traced the evolution of the

personal injury cases allowing damages for fear of contracting a disease, and held, in accordance with those cases, that where the plaintiff has suffered an independently actionable injury by reason of defendant's conduct, the plaintiff may recover both for the injury and for the fear of contracting a subsequent disease, with no need to show that the fear resulted in physiological manifestations. Anticipating this Court's decision in *Metro-North*, the court in *Eagle-Picher* held that mere asymptomatic exposure to asbestos dust does *not* constitute an independently actionable "injury." *Id.* at 529. But because the plaintiffs there were not merely exposed to asbestos fibers, but suffered from the diagnosed disease of asbestosis, the court upheld a jury verdict awarding plaintiffs damages for fear of cancer.[6]

3. Against all of this, the Petitioner's approach is to try to change the subject. The Petitioner devotes pages and pages of its brief to an effort to establish that the weight of authority in the common law cases is that in order to make out a claim for what it acknowledges to be "the independent tort of negligent infliction of emotional distress," Pet. Br. at 10, two requisites must be satisfied that plaintiffs did not satisfy here—(i) that the emotional distress be of such a nature as to generate "substantial bodily harm"; and (ii) that the emotional distress must be the "immediate" result of the traumatic effect of the actor's negligent conduct and cannot follow from an

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[6] Numerous cases are in accord with *Eagle-Picher* on this point. *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, 1990 U.S. Dist. Lexis 7424, slip op. at 4 (N.D. Ill. 1990); *Beeman v. Manville Corp.*, 496 N.W.2d 247, 251-53 (Iowa 1993). The only one to the contrary, *Jones v. CSX Transport*, 287 F.3d 1341, 1348 (11th Cir. 2002), does little more than assume that in a personal injury case, as in a negligent infliction of emotional distress case, the plaintiff must, to recover for emotional harm, prove that the emotional harm caused a physical injury. That assumption is belied by the Restatement and the authorities on which it rests.

intervening event such as learning of one's perilous condition from a physician. Pet. Br. at 17-31.

But the issue in dispute in this case is *not* whether the requisites posited by Petitioner *were* met—it is quite clear they were not—but rather whether those requisites had to *be* met, given that the plaintiffs here pleaded and presented this case as a *personal injury* negligence case, and *not* as a "negligent infliction of emotional distress" case.

As to that issue, Petitioner's entire argument runs for all of two paragraphs. *See* Pet. Br. at 15-16. In neither of those two paragraphs (nor anywhere else in its brief) does Petitioner so much as take note of the fact that § 456 of the Restatement of Torts—quoted in full at p. 6 *supra*—deals in terms with the issue actually presented here, and that it does so on the basis of a long line of common law decisions, including those cited in the Restatement itself.

Nor does Petitioner attempt to identify an alternative body of common law cases that belie either (i) the *Rest. 2d of Torts* § 456 rule that "[i]f the actor's negligent conduct has so caused any bodily harm [such as asbestosis] to another as to make him liable for it, the actor is also subject to liability for (a) fright, shock, or other emotional disturbance resulting from the bodily harm or the conduct which caused it," *Rest. 2d of Torts* § 456; (ii) the further explication of the rule in comment c to § 456 that where negligence causes actionable bodily harm and also results in emotional disturbance, "[t]here may be recovery for such emotional disturbance, *even though the emotional disturbance does not result in any further bodily harm*"; or (iii) comments d and e to § 456, which make clear that the types of "emotional disturbance" for which recovery may be had under the rule go well beyond sensations of pain or suffering radiating from the physical injury and extend to such emotional harms that persist after the injury ceases to be painful, such as "worry," "grief," and "humiliation," as well as to harms that can arise before

the injury is even felt, such as pre-injury "fright." *See supra* at 6-7 (emphasis added).

Instead, Petitioner attempts in the two paragraphs to derive its alternative rule by parsing the words of a brief prefatory passage from this Court's decision in *Gottshall*—a case in which all parties agreed that, because the only injuries caused by the negligence there were emotional injuries, the plaintiffs, to recover at all, had to prove the elements of a "negligent infliction of emotional distress" cause of action. *See Gottshall*, 512 U.S. at 537, 539, 541. The *Gottshall* passage invoked by Petitioner states:

> The term "negligent infliction of emotional distress" is largely self-explanatory, but a definitional point should be clarified at the outset. The injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury, apart from the tort law concepts of pain and suffering. Although pain and suffering technically are mental harms, these terms traditionally have been used to describe sensations stemming directly from a physical injury or condition. The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury. [512 U.S. at 544 (internal citations omitted)]

On the face of it, what the Court is saying is this: in negligent-infliction-of-emotional-distress cases in which, by definition, the tort itself has not produced a physical injury, the types of emotional harm for which the plaintiff seeks compensation are *ipso facto* different from the emotions of pain or suffering that a physical injury generally produces.

Yet Petitioner reads into the passage the negative implication that in physical injury negligence cases, *only* the emotional harms of pain and suffering that radiate from the injury and *not* emotional harms like fright and anxiety are

recoverable as items of damages. Even when the passage is read in isolation, that interpretation is unwarranted. But what makes the interpretation even more unsound is that it would impute to the Court an intent to write a restatement of the law of tort damages that is contrary to *Rest. 2d of Torts* § 456 and to the common law precedent on which § 456 rests—and an intent to do so in a case in which the Court had, just a few sentences before the quoted passage, strongly reaffirmed the proposition "common law principles are . . . entitled to great weight in our analysis" of FELA issues. 512 U.S. at 544. That is no way to read an opinion of this Court.

Without its argument that the *Gottshall* passage requires a personal injury plaintiff who seeks to recover for fright, anxiety, fear and related emotional harms to proceed, if at all, on a separate negligent-infliction-of-emotional distress cause of action, the Petitioner's argument collapses. For, as we have shown, in a personal injury negligence cause of action, there is no requirement that a second physical injury be proved, and it is no bar to recovery that the emotion experienced—here, fear of a future health condition—be an immediate, reflexive response to a trauma rather than a considered response to facts learned later, as from a physician. Indeed, learning of one's health risks from a physician, far from being a bar to recovery, provides an added guarantee that the fear is reasonable. *See Halloran, Ferrara.* The jury instruction here was thus entirely proper.[7]

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[7] As further support for its position, the Petitioner (joined on this point by the United States as *amicus curiae*) invokes this Court's decision in favor of the defendant in *Metro-North*, where the defendant's negligence caused *solely* an emotional injury to a "*disease and symptom free*" plaintiff. *Metro-North*, 521 U.S. at 432 (emphasis added). In particular, the Petitioner and the Government invoke the *Metro-North* Court's discussion of the policy arguments stated in the common-law decisions and the common-law materials, such as the Second Restatement of Torts, as to why a rule permitting recovery on such facts would "on balance cause more harm than good." *Id.* at 438. But the Petitioner and the

II. THE MULTIPLE TORTFEASOR LIABILITY ISSUE

The Petitioner supports its argument for a FELA "several" liability regime—in which damages liability is apportioned "by principles of comparative responsibility when a defendant is a legal cause of all or part of [a plaintiff's] injury that is indivisible by causation," Pet. Br. at 50—with the following common law points: *first*, at the time of FELA's enactment, "[s]everal liability was not only the general rule, but the overwhelming rule," and "[i]n contrast, joint liability [of multiple tortfeasors] was imposed only in limited circum-

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Government miss the essential point of *Metro-North*, which is that the Court should be faithful to the balance reflected in the *common law principles themselves*. *See Metro-North*, 521 U.S. at 436 ("We do not raise these [policy] questions to answer them (for we do not have the answers).").

Thus, the Petitioner and the Government commit an error that is the mirror image of the error made by the unsuccessful plaintiff in *Metro-North*. The plaintiff there "argue[d] that his evidence of exposure and enhanced mortality risk is as strong a proof as an accompanying physical symptom that his emotional distress is genuine." 521 U.S. at 436. But the Court, after acknowledging there was some force to this argument, responded that the argument

> overlooks the fact that the common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns. . . . The common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom), for example, thereby finding a special effort to evaluate emotional symptoms warranted in that category of cases—perhaps from a desire to make the physically injured victim whole or because the parties are likely to be in court in any event. [*Id.*].

Here, for the reasons we have stated, the Petitioner's and the Government's attack on the common-law category *permitting* recovery can fare no better than the *Metro-North* plaintiff's attack on the category *denying* recovery.

stances—none of which is present here—such as when tortfeasors acted in concert or with unity of purpose," *id.* at 35-36; and *second*, "[f]or a period during the middle of the [twentieth] century, joint and several liability was given somewhat broader rein," but "that move toward joint and several liability has since been abandoned as inequitable," *id.* at 39-40, so that "in a clear majority of States, even damages termed indivisible are now apportioned based on notions of comparative responsibility," *id.* at 40. None of these points withstands scrutiny.

A. The joint and several liability rule has deep historical roots in the English precedents and in the American law derived from the English common law. By the time FELA was enacted in 1908, a plaintiff could recover for all his damages from any one of the multiple tortfeasors whose negligence had inflicted a single indivisible injury (such as a physical injury) on the plaintiff.[8]

1. The English common law has recognized the joint and several liability of multiple tortfeasors since the eighteenth century. *Hill v. Goodchild*, 98 Eng. Rep. 465 (K.B. 1771)—in which Lord Mansfield ruled that two tortfeasors who were sued jointly were each fully liable to the plaintiff and that it was improper to apportion the damages liability between the

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[8] "Single, indivisible injuries" are those that by their nature are incapable of practical division, such as death or any single wound. W. Page Keeton, *Prosser and Keeton on Torts* § 52 at 347 (1984); *see also Rest. 2d of Torts* § 433A, cmt. i (1965) ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division . . . . By far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible.").

It is clear that the respondent employees' asbestosis is a single, indivisible injury. *See Urie v. Thompson*, *supra*, 337 U.S. at 169-71 (silicosis a single injury). The Petitioner's suggestion that asbestosis injury is divisible according to exposure, *see* Pet. Br. at 49, is thus wrong both as a matter of tort common law and as a matter of FELA precedent.

two—is a commonly cited precedent. *See* William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 414 (1937) (describing English antecedents to joint and several liability). As Dean Prosser explains, the rule was derived from the "unitary" cause of action that the strict rules on joinder of parties imposed, and allowed the plaintiff (who would not later be allowed to maintain a second action) to recover all his damages from any single tortfeasor who, acting in concert with others, caused plaintiff's injury. *Id.*; A.C. Freeman, II *A Treatise of the Law of Judgments* § 573 at 1212 (5th ed. 1925).

Once that much was established, over the next half century, in a somewhat uneven fashion, the rule was extended to tortfeasors who acted independently of each other but caused the plaintiff a single, indivisible, injury. Thus, in the much cited case of *Illidge v. Goodwin*, 172 Eng. Rep. 934 (K.B. 1831), a defendant—who negligently left a horse and cart unguarded in the street with the result that a passing stranger whipped the horse, who bolted and broke the plaintiff's window—was held liable for the entire damage. As the court held, "[i]f a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." *Id.* at 935.

2. Against this English common law background, the established American rule of multiple tortfeasor liability was described in the following terms in an 1880 treatise:

> If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages of either or both . . . . This rule obtains, although it is impossible to determine in what proportion each of the wrong-doers contributed to the injury; although the act alone of the party sued might have caused the entire injury; and although, if his act had not concurred in producing the wrong, the same damages would have resulted from the act of the other. [II Seymour D. Thompson, *The Law of Negligence* § 5 at 1088 (1880) (footnotes omitted)].

And, in his 1906 treatise Judge Cooley added:

> The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability. The weight of authority will, we think, support the more general proposition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert action." [I Thomas M. Cooley, *Law of Torts* § 166 at 247 (3d ed. 1906) (footnotes omitted).]

Five years later, the *Cyclopedia of Law and Procedure* summarized the American common law rule as being that "[w]here, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." 38 *Cyclopedia of Law and Procedure* at 488 (William Mack, ed. 1911).[9]

The Restatement of the Law of Torts ("*Rest. 1st of Torts*") confirms the foregoing. The goal of the Restatement was "to

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[9] The Petitioner cites to Cooley on Torts and to the Cyclopedia of Law and Procedure, *see* Pet. Br. at 35, n.27, but the cites ignore the sections of those treatises on point (and quoted above) in favor of sections addressed to other matters. Thus, the Petitioner's citation is to a section of Judge Cooley's treatise dealing specifically with nuisances and similar interferences with plaintiffs' property rights as cases outside the purview of the joint and several liability rule. *See* Thomas M. Cooley, *A Treatise on the Law of Torts* § 314 (Students' ed. 1907). *See infra* at 20 & n.10. And, the provision of the Cyclopedia the Petitioner cites, 38 *Cyclopedia of Law and Procedure* at 484, states only that several liability applies where the tortfeasors are responsible for "separate and distinct injuries," a proposition that is perfectly consistent with the joint and several liability rule which addresses single, indivisible injuries.

present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years." *Rest. 1st of Torts* at viii-ix (1939).

On the question of liability of "contributing tortfeasors," § 879 of the First Restatement states: "Except as stated in § 881, each of two persons who is independently guilty of tortious conduct which is a substantial factor causing a harm to another is liable for the entire harm, in the absence of a superceding cause."[10] The comment to § 879 makes clear that each tortfeasor is liable for all damages flowing from the harm regardless of whether the tortfeasors are simultaneously negligent or "where the act of one either occurs or takes harmful effect after that of the other." *Id.* §879, cmt. a.

The traditional common law rule stated in the above treatises and in the First Restatement is supported by numerous case authorities. Because the treatises are well annotated, and provide authorities from many American jurisdictions, *see Cooley on Torts, supra*, at 247-49 & nn.7-10, 12-17; *Cyclopedia of Law and Procedure, supra*, at

[10] Sections 879 and 881 of the First Restatement recognize that in the nineteenth century and through the early part of the twentieth century the common law viewed nuisance torts differently from torts that cause a single indivisible physical injury to the person. Thus, § 879 refers to § 881, which in turn provides that where "two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

488-89 & nn. 14-21, we provide only three of the more fully reasoned decisions as exemplars in the margin.[11]

3. In *The Steamship Juniata*, 93 U.S. 337 (1876), this Court established as the rule of admiralty that a libelant is entitled to recover all his damages for a single indivisible injury from one of two negligent marine tortfeasors, regardless of whether both or only one was sued, and

[11] *Boston and Albany Railroad Co. v. Shanly*, 107 Mass. 568 (1871), involved a suit by a railroad against two explosives manufacturers who independently and without knowledge of the other's activity, shipped explosives without properly packing their contents or warning the railway of dangers associated with shipping them together. One explosive ignited, causing a fire that caused the second explosive to explode. Together, they caused damage to the railroad. The Massachusetts court rejected the manufacturers' defense to joint and several liability, notwithstanding that each acted separately, not in concert, and in ignorance of the other's actions:

> The many ways in which wrongdoers may injure another give rise to some nice distinctions; but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. [107 Mass. at 579.]

See also Barrett v. Third Avenue R.Y., 45 N.Y. 628, 631 (1871) (collision of two carriages causing plaintiff personal injuries where both carriages jointly and severally liable: "If the acts of defendant's servants contributed to the injury, the defendant must respond in damages to the plaintiff, although the negligent acts of the persons in charge of the other car also contributed to the same result, and the comparative degree in the culpability of the two will not affect the liability of either. If both were negligent in a manner and to a degree contributing to the result, they are liable jointly and severally."); *Allison v. Hobbs*, 51 Atl. 245, 246 (Me. 1901) (if two persons "acting independently, by their several acts contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of the injury caused by each, they are then joint tort feasors, within the rule, and may be sued either jointly or severally, at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered").

regardless of whether the tortfeasors acted in concert or independently.

The Court did so by reversing a judgment apportioning damages between two marine tortfeasors—a steamer and a tug—both of whom were found to be negligent and independent contributors to libelant's loss: "We should adjudge that half the amount should be paid by the tug, and the other half by the steamer, but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offense being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages." *The Steamship Juniata*, 93 U.S. at 340. *See also The Atlas*, 93 U.S. 302, 315 (1876) (same).

Indeed, in *The Atlas*, the Court invoked the common law rule of joint and several liability, as we outlined it above, as a basis for its decision: "Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." *Id.* at 315.

This Court's decision in *The Steamship Juniata* and *The Atlas* carry particular weight here. As the Court noted in *The Atlas*, in contrast to the common law, admiralty did not treat a suitor's contributory negligence as a bar to his suit against, and his recovery from, negligent defendants. 93 U.S. at 316-17 ("[c]ontributory negligence on the part of the libelant cannot defeat a recovery in collision cases . . . . Proof of [this] kind will defeat a recovery at common law"); *see also The Max Morris*, 137 U.S. 1 (1890) (applying comparative negligence in admiralty case to permit suit for personal injuries suffered by negligent plaintiff). The Court, mindful of that distinction between the common law and admiralty, nonetheless determined that the traditional common law joint and several liability rule as the Court stated it should be the

admiralty rule. *The Atlas*, 93 U.S. at 316-17. And, in enacting FELA, which removed the contributory negligence bar of the common law, Congress looked specifically to admiralty as a model. *See* 42 Cong. Rec. 4536 (April 6, 1908).

4. Against the foregoing, the Petitioner musters a string cite to three cases that hew to the original eighteenth century English rule that joint and several liability applies only where the multiple tortfeasors act in concert to bring about a single indivisible harm and not where the tortfeasors act independently.[12]

Since the authorities we have reviewed state that the general joint and several liability rule has been the dominant American common law rule, the Petitioner's showing that there was also a narrower minority rule avails it nothing. But at least the three cited cases go to the pertinent point: did the traditional common law provide for joint and several liability or for several liability, where multiple negligent tort-feasors inflict a single, indivisible injury on the plaintiff, such as a physical injury to the person. That cannot be said of the Petitioner's other authorities all of which treat with situations that, by definition, are outside the scope of the common law joint and several liability rule. Since that rule did not purport to govern all multiple tortfeasor cases, the Petitioner's documentation that there were, in addition to the cases governed by the joint and several liability rule, other qualitatively different cases that were governed by a several liability rule, is an exercise in obfuscation.

a. The Petitioner, for example, seeks to make its case by citing cases involving nuisances and tortious damage to crops and livestock that the common law of the time treated as a category of cases outside the scope of the joint and

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[12] At Pet. Br. at 35, n.28, the Petitioner cites to *Schneider v. City Council of Augusta*, 45 S.E. 459 (Ga. 1903); *Weist v. City of Philadelphia*, 49 Atl. 891 (Penn. 1901); *Cole v. Lippitt*, 46 Atl. 43 (R.I. 1900).

several liability rule.[13] *See* Cooley, *supra*, at § 314; *Rest. 1st of Torts* § 881.

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[13] At Pet. Br. n.28, the Petitioner string cites to *Ralston v. United Verde Copper Co.*, 37 F.2d 180 (D. Ariz. 1929) (air pollution); *King v. Ruth*, 101 So. 500 (Miss. 1924) (crop damage); *Mitchell Realty Co. v. West Allis*, 199 N.W. 390 (Wisc. 1924) (stream pollution); *Farley v. Crystal Coal & Coke Co.*, 102 S.E. 265 (W. Va. 1920) (stream pollution); *Jones v. Tennessee Coal, Iron, & R. Co.*, 80 So. 463 (Ala. 1918) (stream pollution); *Boulger v. Northern Pac. Ry.*, 171 N.W. 632 (N.D. 1918) (flooding); *McLeod v. Miller & Lux*, 167 P. 27 (Nev. 1917) (flooding); *Polk v. Illinois Cent. R. Co.*, 195 S.W. 129 (Ky. 1917) (flooding); *Sherwood v. St. Louis Ry. Co.*, 187 S.W. 260 (Mo. 1916) (flooding); *Woodland v. Portneuf Marsh Valley Irr. Co.*, 146 P. 1106 (Idaho 1915) (flooding); *Johnson v. Irvine Lumber Co.*, 140 P. 577 (Wash. 1914) (flooding); *Man v. Stoner*, 87 P. 434, 440 (Wyo. 1906) (diversion of water from ditch); *Standard Phosphate Co. v. Lunn*, 63 So. 429 (Fla. 1913) (stream pollution); *Brown v. Chicago, B. & Q. R. Co.*, 195 F. 1007 (D. Neb. 1912) (flooding); *Sherman Gas & Electric Co. v. Belden*, 123 S.W. 119 (Tex. 1909) (noise and fumes from power plant); *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.*, 66 S.E. 73 (Va. 1909) (land and stream pollution); *Wood v. Snider*, 79 N.E. 858 (N.Y. 1907) (land damage from trespassing animals); *Mansfield v. Brister*, 81 N.E. 631 (Ohio 1907) (pollution of stream); *Watson v. Colusa-Parrot Mining & Smelting Co.*, 79 P. 14 (Mont. 1905) (land pollution); *Anderson v. Halverson*, 101 N.W. 781 (Iowa 1904) (sheep killed by dogs); *Pacific Live Stock Co. v. Murray*, 76 P. 1079 (Ore. 1904) (land damage by animals); *Swain v. Tennessee Copper Co.*, 78 S.W. 93 (Tenn. 1903) (air pollution); *State v. Wood*, 35 A. 654 (N.J. 1896) (crop damage by animals); *Ames v. Dorset Marble Co.*, 23 A. 857 (Vt. 1892) (flooding); *Miller v. Highland Ditch Co.*, 25 P. 550 (Cal. 1891) (flooding); *Middlesex Co. v. Lowell*, 21 N.E. 872 (Mass. 1889) (pond pollution); *Sloggy v. Dilworth*, 36 N.W. 451 (Minn. 1888) (flooding); *Chicago & A.R. Co. v. Glinney*, 9 N.E. 203 (Ill. 1886) (flooding); *Long v. Swindell*, 77 N.C. 176 (1877) (drainage of easement); *Powers v. Kindt*, 13 Kan. 74 (1874) (crop damage by animals).

At Pet. Br. pp.37-38 & nn.30-32, the Petitioner cites as its authority for the proposition that the early American common law showed "a preference for apportionment" the nuisance and like cases that were then regarded as outside the scope of the joint and several liability rule. *Slater v. Pac. Am. Oil Co.*, 300 P. 31 (Cal. 1931) (land pollution); *Harley v. Merrill Brick Co.*, 48 N.W. 1000 (Iowa 1891) (air pollution); *Coleman*

b. The Petitioner also cites to four cases concerning the liability of multiple tortfeasors who have inflicted *multiple separate injuries* on the plaintiff that again constitute a category of cases outside the joint and several liability rule.[14]

c. The Petitioner cites to portions of Judge Cooley's torts treatise and to the Cyclopedia of Law and Procedure which, as noted above, are not addressed to any aspect of the joint and several liability rule at all, but instead to matters outside the scope of that rule. *See* fn. 9, *supra*. In the same vein, the Petitioner cites an ALR annotation, for the proposition that "acts of independent tortfeasors, each of which causes some damage, may not be combined to create a joint liability at law

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Vitrified Brick Co. v. Smith, 175 S.W. 860 (Tex. Civ. App. 1915) (brick plant adjoining homestead); *Mexican Nat'l Constr. Co. v. Middlegge*, 13 S.W. 257 (Tex. 1890) (flooding caused by excavation); *South Iron & Steel Co. v. Acton*, 62 So. 402 (Ala. Ct. App. 1913) (land and river pollution); *Ogden v. Lucas*, 48 Ill. 492 (1868) (crop damage by animals); *Eckman v. Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427 (1911) (stream pollution); *Hill v. Chappel Bros.*, 18 P.2d 1106 (Mont. 1932) (land damage by animals); *Wm. Tackaberry Co. v. Sioux City Serv. Co.*, 132 N.W. 945 (Iowa 1911) (flooding of stream); *Bowman v. Humphrey*, 109 N.W. 714 (Iowa 1906) (stream pollution); *Chipman v. Palmer*, 77 N.Y. 51 (1879) (stream pollution); *Cal. Orange Co. v. Riverside Portland Cement Co.*, 195 P. 694 (Cal. Ct. App. 1920) (air pollution); *Thomas v. Ohio Coal Co.*, 199 Ill. App. 50 (1916) (stream pollution); *Symmes v. Prairie Pebble Phosphate Co.*, 63 So. 1 (Fla. 1911) (pollution to oyster beds).

[14] *Livesay v. First Nat. Bank of Denver*, 86 P. 102 (Colo. 1906) (separate conversions of separate pieces of property); *Le Laurin v. Murray*, 87 S.W. 131 (Ark. 1905) (two separate assaults causing two separate injuries); *Albrecht v. St. Hedwig's Roman Catholic Ben. Ass'n*, 171 N.W. 461 (Mich. 1919) (two distinct intentional assaults (one, an assault on plaintiff in a social club, two, the throwing of the plaintiff out of the social club) that appear to have caused two injuries, although the court did recognize that the plaintiff who was injured would have difficulty assigning the separate damages from each assault); *Gulf C & S & SF Ry. Co. v. Cities Service Co.*, 273 F. 946, 951 (D. Del. 1921) (separate tortious interferences with contract, each creating a separate breach of the contract).

for damages." Pet. Br. at 35. But at the outset, the annotation itself recognizes the general rule of joint and several liability by stating that "probably most authorities agree that if but a single injury is the result of the independent action of various tortfeasors, all may be joined in an action for damages therefor," Annotation, 9 A.L.R. 939, 939 (1920), and only then goes on to describe cases involving multiple tortfeasors, each of whom has "caused some damage," to demonstrate the points that "it is not always possible to say whether the injury is single or separate," *id.*, and that where there are multiple separate injuries the liability of the various tortfeasors is several, not joint and several, *id.*

d. The Petitioner goes even further afield in citing to a number of cases where the issue was whether, and if so how, to segregate the injury to the plaintiff caused by a *single* tortfeasor from harms attributable to other causes, cases that have no relevance to the joint and several liability rule which governs multiple tortfeasor situations.[15]

e. Lastly, the Petitioner discusses at some length *McGannon v. Chicago & N.W. Railway Co.*, 199 N.W. 894 (Minn. 1924) which is said to be "on all fours" with the case before the Court. Pet. Br. at 37. There, the Minnesota court held improper the joinder of two employers, both who harmed plaintiff who inhaled sand dust in their employ. That

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[15] *Boesch v. Graff*, 133 U.S. 697, 706 (1890) (recovery against single tortfeasor separated from harm caused by market forces); *Standley v. Atchison, Topeka & Sante Fe Railway*, 97 S.W. 244, 246-47 (Mo. Ct. App. 1906) (flooding caused by single tortfeasor aggravated by naturally occurring overflow of stream); *Radburn v. Fir Tree Lumber Co.*, 145 P. 632, 644 (Wash. 1915) (same); *Jenkins v. Pennsylvania Railroad*, 51 A. 704, 706 (N.J. 1902) (air pollution caused by single tortfeasor limited to amount above that caused by safe and careful operation). Two of the Petitioner's other cited cases also involve a single tortfeasor. *Louisville, New Albany and Chicago RY v. Jones*, 9 N.E. 476 (1886) (aggravation of existing disease); *Bebout v. Pense*, 14 N.W. 515 (S.D. 1913) (allegation that one of two defendants uttered a slander).

court did so, however, on the grounds that plaintiff had alleged a "separate tort" against each of the employers, and in rendering its holding the court distinguished cases in which two tortfeasors caused "but one injury," recognizing that in those cases joinder was proper. *Id.* at 894. *McGannon*, far from establishing a common law rule of several liability for multiple tortfeasors causing an indivisible injury, is merely an exemplar of the cases providing for apportionment of liability for multiple, divisible injuries. Where the Minnesota court in *McGannon* goes astray is exactly where the Petitioner claims that it is "on all fours with the case at bar": *viz.*, its treatment of silicosis as a divisible set of injuries, a treatment of the injury flatly rejected by this Court in *Urie v. Thompson, supra. See also Joint Torts and Several Liability, supra*, at 443, n.182.

Simply stated, none of the Petitioner's authorities is remotely relevant.

B. As the Petitioner somewhat grudgingly admits, during the middle of the twentieth century—the period from the First Restatement to the Second Restatement—joint and several liability was not simply the widely accepted traditional common law rule of liability where multiple tortfeasors caused the plaintiff an indivisible injury—it was the American rule. *See* Pet. Br. at 39 ("[f]or a period during the middle of the last century, joint and several liability was given somewhat broader rein"); *Rest. 2d of Torts* § 875 ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."). *See also id.* §§ 876, 879 (providing specific applications of the rule), § 433A & cmt. i (explaining that normally personal injuries are indivisible but that nuisance injuries can be divisible).

But, says the Petitioner, just as the evolving common law replaced the earlier well-settled traditional rule against

wrongful death actions by a rule authorizing such actions with a consequent effect on the law of admiralty, *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), so has the evolution of the law since publication of the Second Restatement replaced the traditional joint and several liability rule with a several liability rule, and that change in the common law should be given effect in FELA. *See* Pet. Br. at 39-43; *see also* Br. of Amici Coalition for Asbestos Justice at 21-23. But in contrast to *Moragne*, in this instance there has been no sea change in the common law.

The last 30 years have seen a wide-ranging review—principally by State legislatures—of the multiple tortfeasor liability rules. The outcome has not been anything like a general move to replace the joint and several liability rule with the several liability rule the Petitioner advocates. Rather, the salient points regarding the current State laws, as compiled in the *Restatement (Third) of Torts: Apportionment of Liability* (2000) (hereafter "*Rest. 3d of Torts*") are these:

- Twenty jurisdictions maintain the joint and several liability rule as it existed at common law. Thirteen jurisdictions provide for joint and several liability in all cases.[16] Seven more provide for joint and several liability in all the cases that have traditionally been actionable at common law, by providing that a non-negligent plaintiff may recover all the damages for his indivisible injury jointly and severally from any of the multiple tortfeasors.[17]

[16] *See Rest. 3d of Torts* §17 at 151-52: (Alabama, Arkansas, Delaware, District of Columbia, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia all have retained pure joint and several liability with respect to each contributing tortfeasor).

[17] Georgia, Oklahoma, and Washington have expressly maintained the joint and several liability rule for suits by non-negligent plaintiffs. *Rest. 3d of Torts* at 153. In Minnesota, Missouri, Montana, New Hampshire,

- By contrast, fewer States have adopted the strict rule of apportioning indivisible injuries by comparative fault that Petitioner advocates this Court should adopt as the rule for FELA claims. *See* Pet. Br. at 50. Upon inspection, the *Rest. 3d of Torts* lists only ten States that apply pure several liability in all cases. *Id.* at 154-55. All but one, Tennessee, have provided for several liability by legislative enactment. *Id.*[18]

In *Moragne*, the Court observed that over the course of many decades legislatures had shown a "unanimous disapproval of the rule against recovery for wrongful death," 398 U.S. at 389, such that at the time of its decision, every State had enacted a wrongful death statute, *id.* at 390. Against that showing, the Court concluded that "the work of legislatures has made the allowance of recovery for wrongful death the general rule of American law," and that the rule should therefore be incorporated into the law of admiralty. *Id.* at 393.

It simply cannot be said that state legislative enactments have made apportionment of multiple tortfeasor liability on the basis of several liability "the general rule of American law." To the contrary, although many legislatures have modified the traditional common law rule of joint and several liability, many have not. And even with respect to those jurisdictions that have, the resulting "farrago of arrangements" do not represent a clear and uniform response of the

and Oregon, multiple tortfeasors are jointly and severally liable for all damages caused by indivisible injuries, but if a defendant can prove that contribution from other defendants is uncollectable, the court reallocates the uncollectable share in proportion to comparative responsibility. *Id. at* §§C18, C21(a), *& p.156*. Thus, in these States a non-negligent plaintiff proceeds in court under the common law joint and several liability rule.

[18] The remaining 21 States have adopted one or more of a variety of hybrid joint and several/several liability regimes, many of which are quite complex. *See Rest. 3d of Torts* § 17.

kind the Court in *Moragne* found persuasive. See *Rest. 3d of Torts* §10, cmt. a.

b. The federal common law, as it has been applied by this Court and by lower federal courts, cuts deeply against the Petitioner's thesis that the common law rule of joint and several liability has been abandoned as inequitable in favor of a several liability rule. In addition to admiralty, *see supra* at 22, federal courts apply joint and several liability under the Jones Act, 46 U.S.C § 688, a statute modeled on FELA to protect seamen from their employer's negligence, *see Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), under common maritime law, *see Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. en banc) (Higginbotham, J.), and under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, *see Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263, 271 (1979).[19] Indeed, *Edmonds* expressly rejected an entreaty to abandon joint and several liability in favor of proportional fault apportionment, 443 U.S. at 271, as did the Fifth Circuit in *Coats*, 61 F.3d at 1130-32.

CONCLUSION

For the above-stated reasons, and those stated by the Respondents, the decision below should be affirmed.

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[19] In addition to demonstrating the continuing vitality of traditional joint and several liability as a federal common law rule, the foregoing authorities also refute the suggestion, made both by the Petitioner and its amici, *viz.*, that joint and several liability is incompatible with notions of comparative negligence that allow a plaintiff to recover damages even if he also was negligent, because under this regime each wrongdoer should only be liable for its portion of fault. *See* Pet. Br. at 43.

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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF THE STATES OF WEST VIRGINIA, CALIFORNIA, DELAWARE, GUAM, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, AND VERMONT IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Employers Liability Act ("FELA") requires that damages for indivisible harms such as personal injuries be "apportioned" among all potentially responsible tortfeasors.

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned Attorneys General of the States of West Virginia, California, Delaware, Guam, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, and Vermont submit this brief in support of respondents Freeman Ayers, *et al.* soley on the question of whether damages should be "apportioned" among responsible tortfeasors under the FELA.[1] *Amici* have a strong interest in this case for two reasons.

First, *amici* have a strong, principled interest in safeguarding the ability of injured plaintiffs to recover damages from responsible tortfeasors. This is a long-standing and important right under applicable law. The civil justice system promotes substantial state interests in public health, safety, and welfare. It also ensures that injured victims receive compensation from responsible tortfeasors rather than burdening public assistance programs and the treasuries of the States.

One of the most venerable and important components of state civil justice systems is the rule of joint and several liability. Although joint and several liability is often regarded as a modern innovation, the doctrine actually is one of the foundation stones of the civil justice system. The first recorded case invoking the doctrine was published in 1302, and the doctrine was well cemented in the common law of torts on both sides of the Atlantic in the centuries preceding the American Revolution. This traditional, well-established tort principle lies primarily within the state domain rather than the federal realm. State courts have been principally responsible for expounding, interpreting, and applying joint and several liability and other rules of tort law. Although legislatures in certain states have chosen to modify the rule of joint and several liability, these legislative efforts

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1. This brief does not address the first question certified by the court of whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer without proof of physical manifestations of the claimed emotional distress.

reflect important policy choices on the part of the States. States, through their courts or legislatures, should remain free to make different judgments and adopt different approaches as they see fit.

Hence, even States that have modified joint and several liability by statute have an important interest in this case. Through long processes of common-law evolution and legislative enactment, the States have developed and refined their tort systems to balance the needs and rights of victims against the interests of defendants. *Amici* urge this Court not to upset this balance by disturbing longstanding principles of tort law, including joint and several liability. These principles should be left to the States.

Second, *amici* have a compelling self-interest in preserving traditional rules of tort law, including joint and several liability, because the States frequently sue as plaintiffs to vindicate their own interests and to protect the interests of their employees, residents, and citizens. In recent years, many state and local governments have acted as plaintiffs by filing actions against tobacco companies,[2] pharmaceutical

2. *See, e.g.*, *Alaska v. Philip Morris*, No. 1JU-97-915CI (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco Co.*, No. CV-SC-14769 (Ariz. Sup. Ct. May 27, 1997); *Colorado v. R.J. Reynolds Tobacco Co.*, 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); *Florida v. American Tobacco Co.*, CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996); *Hawaii v. Brown & Williamson Tobacco Co.*, No. 97-0441-01 (Haw. Cir. Ct. Sept. 18, 1998); *Idaho v. Philip Morris*, No. CV-OC-97-03239 *D (Idaho Dist. Ct. Sept. 2, 1998); *Illinois v. Philip Morris*, No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997); *Iowa v. R.J. Reynolds Tobacco Co.*, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997), *Maryland v. Philip Morris*, 1997 WL 540913 (Md. Cir. Ct. 1997); *Massachusetts v. Philip Morris*, No. 95-7378-J (Mass. Super. Ct. Oct. 22, 1997); *Michigan v. Philip Morris*, No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); *Minnesota v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996); *Mississippi v. American Tobacco Co.*, No. 94-1429 (Miss. Chan. Ct. Feb. 21, 1995); *Montana v. Philip Morris*, No. CDV-97-306 (Mont. Dist. Ct. Sept. 23, 1998); *Nevada v. Philip Morris*, No. CV97-03279 (Nev.

(Cont'd)

manufacturers,[3] software makers,[4] lead paint manufacturers,[5] and other defendants.

Today, many States are taking an active role in proceedings involving WorldCom, Inc.,[6] Arthur Anderson

(Cont'd)

Dist. Ct. May 8, 1998); *New Jersey v. R.J. Reynolds Tobacco Co.*, No. C-254-96 (N.J. Super. Ct. Sept. 18, 1998); *Ohio v.* Philip Morris, No. 97CVH05-5114 (Ohio Ct. of Common Pleas Aug. 28, 1998); *Oregon v. American Tobacco Co.*, No. 9706-04457 (Multnomah Co. Cir. Ct. June 1997); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997); *Vermont v. Philip Morris*, No. S 744-97 CnC (Vt. Super. Ct. Mar. 25, 1998); *Washington v. American Tobacco Co.*, No. 96-2-15-56-8 SEA, 1996 WL 931316 (Wash. Super. Ct. 1996); *West Virginia v. American Tobacco Co.*, No. 94-C1707 (W. Va. Cir. Ct. May 3, 1995); *and Wisconsin v. Philip Morris*, No. 97-CV-328 (Wis. Cir. Ct. Mar. 17, 1998). *See also Rosello v. Brown & Williamson Tobacco Corp.*, No. 97-1910 (JAF) (D.P.R. Aug. 10, 1998).

3. *See, e.g.*, *State of Connecticut v. Mylan Laboratories, Inc.*, M.D.L. No. 1290, Misc. No. 990276 (D.D.C. 19__) (action by the Attorneys General of the fifty States and the District of Columbia against five defendants); *State of Ohio v. Bristol-Myers Squibb* (D.D.C. filed June 4, 2002) (suit for alleged excessive pricing of breast cancer drug Taxol by twenty-nine States and District of Columbia).

4. *See, e.g.*, *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (D.D.C. 1998).

5. *See, e.g.*, *Sheldon Whitehouse, Att'y Gen. of the State of Rhode Island v. Lead Industries Ass'n*, No. 99-5226, 2001 WL 345830 (R.I. Super. Apr. 2, 2001) (rejecting motion to dismiss and holding that state attorney general has standing to sue on counts of public nuisance, civil conspiracy, unjust enrichment, indemnity, and violation of state unfair trade practice and consumer protection act, regarding claims based on strict liability and negligence that alleged harm resulting from lead in public buildings). *See also City of New York v. Lead Industries Ass'n, Inc.*, 275 A.D.2d 669, 713 N.Y.S.2d 345 (N.Y.A.D. 1 Dept. 2000).

6. *See, e.g.*,*West Virginia Investment Management Board v. WorldCom, Inc, et al.*, C.A. No. 02-C-1877, (Cir. Ct. of Kanawha Co., filed July 17, 2002).

LLP,[7] Global Crossing, Ltd.,[8] Enron Corp. and other companies whose potential securities violations have resulted in enormous losses to state employee pension funds. Tellingly, the States often invoke joint and several liability principles to sue the accounting firms, affiliates, subsidiaries, officers, directors, or investment banks of these companies. For example, West Virginia invoked those principles in its recently filed lawsuit against WorldCom, Inc. That suit also names, as defendants, WorldCom's former CEO, Bernard J. Ebbers, WorldCom accounting firm, Arthur Andersen LLP, and WorldCom's investment banks, including Cititgroup, Inc, Salomon Smith Barney, Inc., J.P. Morgan Securities, Inc., and Banc of America Securities LLC.[9]

Indeed, the Attorneys General of 26 States — Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wisconsin — recently filed a brief *amici curiae* in the University of California's federal securities fraud suit against Enron Corp., urging the presiding judge to deny the motions to dismiss submitted by Enron's investment banks, law firms, and accounting firms. Significantly, the Attorneys General contend that Enron's accounting firms, law firms, and investment banks can be found "primar[ily] liable" — *i.e.*, jointly, not proportionately liable — for the company's alleged fraud, even though aiding-and-abetting liability does not exist under federal securities law.[10]

7. *See, e.g., State of Connecticut v. Arthur Andersen LLP, et al.*, CV-02-0816222-S (Conn. Super. Ct., Hartford, filed Apr. 16, 2002).

8. *See, e.g., Roffe v. Global Crossing, Ltd.*, C.A. No. 02-CV-1039 RSWL(Ctx) (C.D. Cal., W. Div., filed Feb. 14, 2002).

9. *West Virginia Investment Management Board v. WorldCom, Inc., et al., supra.*

10. *In re Enron Corp. Sec. Litig.*; No. 01-3624, *Amicus Curiae* Memorandum Relating to Motion to Dismiss, at 8 (S.D. Tex., filed June 10, 2002).

The Attorneys General accordingly assert that each of "the banks, law firms, and accountants are subject to liability for each other's conduct. . . ."[11]

Whenever States prosecute lawsuits as plaintiffs, they are entitled to rely on traditional rules of tort law, including the venerable doctrine of joint and several liability. Significantly, however, as the States note in their *Enron* brief, "state courts often look to federal case law for interpretative guidance in construing" comparable state law.[12]

That precept applies with particular force to decisions rendered by this Court. For that reason, any pronouncement by this Court that joint and several liability is an antiquated, disused, and disdained doctrine, a doctrine that is out of fashion and out of step with the common law — or any declaration that apportionment of damages is now part of the "national consensus" of common law courts — would not only be inaccurate but could have considerable repercussions in the State courts and wherever the States seek to vindicate their own interests or protect the rights of their employees, residents, and citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner contends that in cases such as this one involving interpretation of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.*, this Court's determination of liability rules is " 'informed by reference to the evolving common law.' "[13] Petitioner asserts: (a) that apportionment (essentially a rule of proportionate several liability) prevailed at common law prior to FELA's enactment; and (b) apportionment constitutes the common law in the majority of U.S. jurisdictions today. On the basis of these assertions, petitioner asks this Court to announce a common-law principle that damages must be

11. *Id.* at 16.

12. *Id.* at 2.

13. *Buckley v. Metro-North Commuter R.R.*, 521 U.S. 424, 439 (1997) (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958)).

apportioned among tortfeasors whenever such apportionment is reasonably possible.

This Court should reject this request because both assertions are incorrect. Indeed, petitioner's assertions are belied by the fact that to the extent that state law regarding apportionment has changed in recent decades, that law has been changed overwhelmingly by enactments of state legislatures, not by decisions of common law state courts.

In this light, petitioner is not merely asking the Court to re-state ostensibly well-settled common law principles (as they supposedly existed at the time of FELA's enactment and purportedly exist today) but to re-interpret and reform a body of tort law that is the traditional province of the States, not the federal government. This Court should tread carefully in such matters.

Amici submit that the prevailing rule at common law has long been and still remains the principle of joint and several liability, not proportionate several liability. Joint and several liability has been particularly important in cases involving personal injuries, deaths, and other indivisible harms.

In *amici's* view, state courts and state legislatures should be free to choose different approaches to joint and several liability. In fact, the majority of the States have chosen to retain joint and several liability, in whole or in part, and there are sound policy reasons for doing so. This Court would not be justified in declaring that there is a "national consensus" in favor of apportionment. Nor would this Court be justified in enshrining a uniform, national standard of proportionate several liability in the FELA.

ARGUMENT

A. Under Traditional Common Law Principles, Defendants Were Jointly Liable for the Entire Injury They Caused.

Petitioner argues that the common law required that damages be apportioned among all potentially contributing causes whenever such apportionment was possible. Petitioner argues that "[a]pportionment was the common law rule."

Petitioner's Br. 32. That is not an accurate statement of the law. Indeed, by acknowledging that States have departed from joint and several liability by *statute*, petitioner implicitly concedes that apportionment was not the common-law rule.

As explained by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"),

> [a]t early common law, there was no occasion to apportion tort responsibility, for at least two reasons. First, contributory negligence of the plaintiff was a complete bar and apportionment of responsibility between a plaintiff and a defendant was not part of the process. The plaintiff either recovered all of his or her damages or recovered nothing. Second, the rules of procedure would not permit joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert. Each tortfeasor had to be sued separately.[14]

The absence of apportionment did not, however, prevent plaintiffs from recovering from defendants who had contributed to their injuries. As the leading treatise on torts explained, "[q]uite apart from any question of vicarious liability or joinder of defendants, the common law developed a separate principle, that a defendant might be liable for the entire loss sustained by the plaintiff, even though the defendant's act concurred or combined with that of another wrongdoer to produce the result."[15] Although each tortfeasor had to be sued separately, "each might be liable for the entire loss."[16] "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such

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14. Prefatory Note, Uniform Apportionment of Tort Responsibility Act, at 1 (2002 draft).

15. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 47, at 328 (5th ed. 1984).

16. *Id.*

causes, innumerable, are always present."[17] "Thus, where two vehicles collide and injure a bystander, or a passenger in one of them, each driver may be liable for the harm inflicted."[18]

The common law enabled each tortfeasor to be held liable for the entire result of the joint tort. In *Barlye v. Martin*, for example, the mid-seventeenth century English court held that it was no defense that an action for trespass "ought to have been brought particularly, against the other trespassers together with the defendant, and not against the defendant in particular."[19] The court held that the plaintiff may proceed against the other tortfeasors "when he can, and that he may well proceed against them at divers times as he can take them."[20] The same principles guided English courts as far back as 1302,[21] and joint and several liability was frequently recognized by English courts throughout the seventeenth and eighteenth centuries and well into the nineteenth century.[22]

17. *Id.* at § 41, p. 268.

18. *Id.* (citing *Chiles v. Rohl*, 201 N.W. 154 (S.D. 1924); *Kinley v. Hines*, 137 A. 9 (Conn. 1927); *Peters v. Johnson*, 264 P. 459 (Or. 1928); *Glazener v. Safety Transit Lines*, 146 S.E. 134 (N.C. 1929); *McDonald v. Robinson*, 224 N.W. 820 (Iowa 1929)). *See also* William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937).

19. 82 Eng. Rep. 498, 498 (1647).

20. *Id.*

21. *See De Bodreugam v. Arcedekne*, YB 30 Edw. I (Rolls Series) 106 (1302) (defendants jointly and severally liable for participating in a joint beating and kidnapping).

22. *See, e.g., Dixon v. Bell*, 105 Eng. Rep. 1023 (1816) (defendant gave loaded gun to young servant, who negligently shot plaintiff); *Illidge v. Goodwin*, 172 Eng. Rep. 934 (1831) (defendant left horse unguarded in street, passing stranger whipped it); *Lynch v. Nurdin*, 113 Eng. Rep. 1041 (1841) (defendant left horse and cart in street, and boy made them move). *See also Brown v. Wooton*, 79 Eng. Rep. 62, 63 (1600) (remedy against one is remedy against all); *Crane & Hill v. Hummerstone*, 79 Eng. Rep. 102 (1606) (joint judgments must be given against both defendants); *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151 (1612)

(Cont'd)

Antebellum American courts similarly followed the rule that tortfeasors who acted independently to create the plaintiff's injury were each liable for the entire harm. Justice Story explained that "actions, founded in tort, may be maintained against all, or any one or more of the tortfeasors; for every tort is joint, as well as several," and that "[t]here is no principle, upon which the defendant has a right, in any courts of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint."[23]

This Court followed these same principles in the decades preceding FELA's enactment. In *Washington & Georgetown R. Co. v. Hickey*,[24] for example, this Court rejected a streetcar

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(each participant in a joint beating held entirely liable, regardless of his particular role in the assault); *Brown v. Nelson*, 82 Eng. Rep. 741 (1650) (in action for joint trespass, satisfaction may be had against one party in the absence of others); *Radney v. Strode & Others*, 89 Eng. Rep. 1046 (1685) (plaintiff may choose against whom to take judgment); *Smithson v. Garth and Others*, 83 Eng. Rep. 711 (1691) (each defendant who participated in a joint tort beating — where one hit the plaintiff, a second held him, and a third stole his property — was entirely liable for all ensuing injuries, regardless of his particular role); *Bastard v. Hancock*, 90 Eng. Rep. 810 (1695) (one defendant may be liable for a joint action); *Onslow v. Orchard*, 93 Eng. Rep. 610 (1721) (damages must be joint, not several); *Lowfield v. Bankroft* and Al, 93 Eng. Rep. 935 (1731) (same); *Sabin v. Long*, 95 Eng. Rep. 475 (1743) (same); *Hill v. Goodchild*, 98 Eng. Rep. 465 (1771) (damages may not be severed).

23. *Smith v. Rines, et al.*, 22 F. Cas. 639, 643 (C. Mass. 1836) (2 Sumn. 338, No. 13,100) (Story, J.). *See also Wright v. Lathrop*, 2 Ohio 33, 53 (1825) ("That each joint trespasser is answerable for the acts of all, and that the plaintiff may pursue his remedy against one or all, is unquestioned."); *Williams v. Sheldon*, 10 Wend. 654, 656 (N.Y. 1833); *Hopkins v. Hersey*, 20 Me. 449, 452-453 (1841) (successive illegal sales of the same oxen; no joinder permitted, and each defendant may be held liable for the whole injury); *Webb v. Cecil*, 48 Ky. 198, 49 Am. Dec. 423 (1848) (slander of title by two defendants, and no joinder possible).

24. 166 U.S. 521 (1897).

company's defense to a personal injury claim for which it was jointly responsible. Similarly, in *Grand Trunk Ry. Co. v. Cummings*,[25] this Court held that a negligent railroad could be held liable for an employee's injury, even though the negligence of a fellow-servant of the employee also contributed to the injury.[26] Finally, as Justice Holmes explained on the eve of FELA's enactment, under admiralty law, where two vessels were both at fault, the cargo owners could recover their whole damages from either one.[27]

State supreme courts followed the same rule in the half-century prior to FELA's enactment. The Illinois Supreme Court, for example, adhered to

> the long and well-established principle that where one has received an actionable injury at the hands of two or more wrong-doers, all, however, numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has the election to sue all jointly, or he may bring his separate action against each or any one of the wrong-doers.[28]

25. 106 U.S. 700, 702 (1882).

26. *See also Gila Valley, Globe & Northern Ry. Co. v. Lyon*, 203 U.S. 465, 473 (1906) ("if the negligence of the company had a share in causing the injury to the deceased, the company was liable, notwithstanding the negligence of a fellow servant contributed to the happening of the accident").

27. *Erie Ry. v. Erie & W.T. Co.*, 204 U.S. 220, 224 (1907). *See also Memphis Consol. Gas & Electric Co. v. Creighton*, 183 F. 552, 555 (6th Cir. 1910) ("[T]he causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. . . . In such case an inquiry about the proximate cause is not pertinent, for both are liable.").

28. *Wabash, S. L & P. Ry. Co. v. Shacklett*, 105 Ill. 364, 381 (1883); *see also Murdock v. Walker*, 43 Ill. App. 590, 592 (1892) (separate negligence of druggist did not limit doctor's malpractice liability: "the negligence of the druggist concurred with that of the appellant in producing the result, which is not a defense").

Similarly, the Massachusetts Supreme Judicial Court held multiple defendants jointly liable for entire harm even though

> [i]t is not alleged that these parties acted in concert in making the several articles, or placing their respective articles in the plaintiffs' care, nor even that they had knowledge of each other's proceedings. Each acted separately in sending goods, and omitting to give notice. But each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his.[29]

The Minnesota Supreme Court explained that it had no choice but to adhere to "the rule that it is immaterial how many others may have been in fault, if the defendant's act or negligence was an efficient cause of the injury."[30] The New York Court of Appeals carefully articulated the logic of this principle.

> It is true the defendant and Moore & Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all.[31]

Again, while

> the contractor and subcontractors were separately negligent, and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defence for a person against whom negligence which caused damage is

29. *Boston & Albany R. Co. v. Shanly*, 107 Mass. 568, 577 (1871).

30. *Campbell v. City of Stillwater*, 20 N.W. 320, 321 (Minn. 1884).

31. *Slater v. Mersereau*, 64 N.Y. 138, 146 (1876).

proved, to prove that without fault on his part the same damages would have resulted from the act of another.[32]

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32. *Id.* at. 147. *See also West Muncie Strawboard Co. v. Slack*, 72 N.E. 879, 880 (Ind. 1904)

> If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, . . . creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, . . . and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflicting.

"[E]ach may be answerable in a joint and several action not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights."; *South Bend Mfg. Co. v. Liphart*, 39 N.E. 908, 909 (Ind. Ct. App. 1895)

> The case is analogous to that of an injury produced by the collision of two railroad trains under different ownership and management, caused by the concurring negligence of both companies. Each company is jointly and severally liable for the whole injury. . . . The fact that the negligence of some other person concurred in producing the injury will not screen him from liability.

Stone v. Dickinson, 87 Mass. 29, 31-32 (1862)

> It does not in any way change or affect the injury done to the plaintiff . . . that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. . . . He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*.

McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285, 301 (1885) (act of negligence is not excused by the fact that an unforeseen concurrent event co-operated with it to produce plaintiff's injury: "the defendant is liable

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Finally, state supreme courts followed the same rule in the decades after FELA's enactment. For example, the Virginia Supreme Court rejected a request to apportion the injury to plaintiff's land between a railroad and a lumber company. As that court explained: "The doctrine is thoroughly established that where there are several concurrent negligence causes, the effects of which are not separable, though due to independent authors, either of which is sufficient to produce the entire loss, all are jointly or severally liable for the entire loss."[33]

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for [harm], although other causes concurred at the time to produce the injury"); *Sheridan v. Brooklyn & Hudson River R. Co.*, 36 N.Y. 39, 41 (1867) ("It is no justification for the defendants, that another party, a stranger, was also in the wrong."); *Colegrove v. N. Y. & Hudson River R. Co.*, 20 N.Y. 492, 494 (1859) (passenger injured by a collision resulting from the concurrent negligence of two railroad corporations may maintain a joint action against both); *Bard v. Yohn*, 26 Pa. 482 (1856) (plaintiff, who was kicked by one defendant's horse and thrown against another's carriage, may recover in full against either).

33. *Carolina, Clinchfield & Ohio Ry. Co. v. Hill*, 89 S.E. 902, 903 (Va. 1916). *See also, e.g., McDaniel v. Cherryvale*, 136 P. 899, 899-900 (Kan. 1913) (city and oil company that each discharged pollution into stream were jointly liable, under rule that "if two or more persons by their concurrent wrongdoing cause injury to a third they are jointly and severally liable and the injured party may, at his option, institute an action and recover against one or all of those contributing to the injury"); *Arnold v. Milling Co.*, 119 P. 373, 374 (Kan. 1911) (where flooding was caused both by railroad's embankment and by dam constructed by other parties, "the plaintiff was therefore entitled to sue all for the joint tort"); *Tidal Oil Co. v. Pease*, 5 P.2d 389, 390-91 (Okla. 1931) (imposing joint liability where cattle drank from one or both of two streams poisoned by different defendants); *Cushing v. High*, 175 P. 229, 230 (Okla. 1918)

> There were a few refineries close to the property of the plaintiff below, and it was disclosed that he had sued them to recover damages for the pollution of the stream which flowed through his property. . . . [T]he fact that said stream was polluted from other sources was not any defense or excuse for the city to add thereto, nor would that fact prevent the owner from recovering from the city for any damages caused to him. . . .

Not surprisingly, all of the leading common-law treatises articulated the same principle of joint liability. *See, e.g.*, Francis M. Burdick, A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW 213 (1913) ("[I]f either of the wrongdoers committed his tort in circumstances which would fairly apprise a reasonably careful person that it would co-operate with the tort of another, he is answerable for the entire damage."); Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS *144 (2d ed. 1888) ("the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury"); Fowler V. Harper, A TREATISE ON THE LAW OF TORTS § 302, at 676 (1st ed. 1933) ("Joint liability in tort may be imposed . . . where, although there is no joint action, nevertheless the independent acts of several actors concur to produce the harmful consequences."); *id.* at 677 ("[A]ll are jointly and severally liable for the entire damage. Neither can plead that the injury would have happened irrespective of his acts, for by the same argument all could escape liability. Better that all should be liable, and such is the result of the cases.").

Thus, the principle of joint and several liability was well-settled at common law in the decades before and after FELA's enactment. In cases of concurrent, independent action, a plaintiff was not permitted to join multiple defendants in one suit, but he or she could sue one defendant and hold that defendant entirely liable as long as the defendant's act proximately caused the plaintiff's injury. Furthermore, as discussed below in Section C, modern developments provide no basis for incorporating a rule of proportionate several liability in FELA.

B. Unitary Personal Injuries Have Not Been Considered "Divisible" under the Common Law

The rule of joint liability has been particularly important in cases of torts resulting in unitary personal injuries, for such injuries traditionally have been regarded as "indivisible" and not subject to apportionment. This principle is a direct descendant of the famous "exploding squib" case, *Scott v. Shepard*,[34] which established that each tortfeasor is independently and entirely liable for an indivisible injury. As Dean Prosser explained:

> Certain results, by their very nature, are obviously incapable of any practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each may be charged with all of it. . . . If a defendant is liable at all, he will be liable for all the damage caused.[35]

The Restatement follows the same approach. The Restatement of Torts § 875 and the Restatement (Second) of Torts § 879 both impose joint and several liability on independent tortfeasors who cause an indivisible injury. The Restatement (Second) of Torts, states the same rule as Prosser:

> Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of accomplishing the result, to say that one man has caused half of it and another the rest. The same is true of a broken leg, or any single wound, or the destruction of a house by fire, or the sinking of a barge. Such harms can be apportioned, if it all, only upon the basis of a prior reduction in value of what has been destroyed.[36]

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34. 95 Eng. Rep. 1124, 1127-1129 (1773).

35. William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 47, at 300, 302 (1st ed. 1941).

36. § 433A, comment i (1965).

Moreover,

> [b]y far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.[37]

It is well-established that like asbestosis, "mesothelioma is an indivisible injury."[38] This conclusion is well-grounded in common law decisions concerning other types of personal injuries such as broken limbs,[39] the results of medical malpractice,[40] and injuries from auto accidents.[41] Even property damage has often been held to be indivisible and not subject to apportionment.[42]

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37. *Id.*

38. The Restatement (Third) of Torts (Final Tent. Draft 1999), § 28A, illustration 1. *See also, e.g., Borel v. Fibreboard Paper Prods.*, 493 F.2d 1073, 1094-95 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestosis and mesothelioma are indivisible injuries subject to joint and several liability); *Sealover v. Carey Canada*, 791 F. Supp. 1059, 1063 (M.D. Pa. 1992) (asbestosis and mesothelioma are indivisible injuries subject to joint and several liability), *rev'd on other grnds*, 996 F.2d 42 (3d Cir. 1993).

39. *E.g., Capone v. Donovan*, 480 A.2d 1249 (Pa. Super. Ct. 1984).

40. *E.g., Harvey v. Denton*, 601 S.W.2d 121, 124 (Tex. Civ. App. 1980).

41. *E.g., Piner v. Superior Court of Maricopa*, 962 P.2d 909 (Ariz. 1998); *Buehler v. Whalen*, 374 N.E.2d 460, 465 (Ill. 1977).

42. *E.g., Bill C. Harris Constr. Co. v. Powers*, 554 S.W.2d 332, 337 (Ark. 1977) (damage to bulldozer indivisible and "[d]amages for the entire injury may be recovered from all or any one of the joint tortfeasors"); *D&W Jones, Inc. v. Collier*, 372 So.2d 288, 290-94 (Miss. 1979) (pollution of ponds was "single, indivisible injury").

The burden of proving divisibility rests with the defendant, and any difficulties of meeting that burden are resolved in favor of joint liability. In the words of Dean Wigmore,

> [w]herever two or more persons by culpable acts, whether concerted or not, cause a single general harm not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole. In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer; make any one of them pay for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.[43]

Accordingly, there is ample reason to regard personal injuries as "indivisible" harms subject to joint and several liability.

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43. J.H. Wigmore, *Joint Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 Ill. L. Rev. 458, 459 (1923); *see also* 1 Stuart M. Speiser, *et al.*, THE AMERICAN LAW OF TORTS § 3.7, at 398 (1983 and 2002 supp.) ("[T]he burden of proof is on the defendant once the plaintiff has made a prima facie showing that the defendant's conduct contributed as a proximate cause to the harm suffered by plaintiff."). *See Maddux v. Donaldson*, 108 N.W.2d 33, 38 (Mich. 1961) ("Is it better . . . that a plaintiff, injured through no fault of his own, take nothing, rather than that a tort-feasor pay no more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create?"); *Azure v. Billings*, 596 P.2d 460, 470-71 (Mont. 1979) ("[W]here the tortious act is established, it is better that the tortfeasor should be subject to paying more than his theoretical share of the damages in a situation where the tortious conduct has contributed to the confused situating making it difficult to prove which tortious act did the harm."); *Phennah v. Whalen*, 621 P.2d 1304, 1307 (Wash. Ct. App. 1980) ("The emerging rule from this line of cases is that when the harm is indivisible as among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves.").

C. Modern Developments Provide No Basis for Incorporating a Rule of Proportionate Several Liability in FELA.

Although petitioner focuses on the contemporary adoption of comparative fault statutes, such enactments are consistent with joint and several liability. The 1977 Uniform Comparative Fault Act incorporated a modified form of joint and several liability in its proposal of comparative negligence principles.[44] As Dean Wade explained, the comparative fault schemes, as originally adopted, allowed percentage shares of fault to be assigned to each of several defendants, but these schemes did not change the rule that each defendant could be held 100% responsible to the plaintiff.[45] Hence, until recently, numerous states adhered to joint and several liability after the adoption of comparative fault schemes, recognizing that the allocation of comparative fault *among defendants* does not alter a joint tortfeasor's full responsibility for a plaintiff's single, indivisible injury. Thus, "of the thirty-eight . . . states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a [limited or] modified form, and only three have done away with it."[46]

Today, the States have chosen a variety of approaches to joint and several liability. According to the Restatement (Third) of Torts, fourteen States and the District of Columbia have retained joint and several liability in its traditional form.[47]

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44. Uniform Comparative Fault Act § 2, 12 U.L.A. 49 (West Supp. 1992).

45. *See* John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 Am. J. Trial Advoc. 193, 194-97 (1986).

46. *Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983).

47. *See* Restatement (Third) § 17 at 151. *See also Buchanan v. Collier*, 555 So.2d 134 (Ala. 1989); *Bill C. Harris Constr. Co. v. Powers*, 554 S.W.2d 332 (Ark. 1977); *Clark v. Brooks*, 377 A.2d 36[illegible] (Del. Super. Ct. 1977); *National Health Labs. v. Ahmadi*, 596 A.2d 555 (D.C. 1991);

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Another four States have retained joint and several liability when the plaintiff is free from fault (and sometimes even when the plaintiff is partially at fault).[48]

Although the Restatement identifies 36 States as having chosen to modify joint and several liability, few States have abolished it for all cases, injuries, circumstances, and types of damages, and there are significant variations in the schemes adopted by the States that have chosen to merely modify the doctrine. For example, some States, such as *New Hampshire*, have eliminated joint and several liability only where the defendant's comparative responsibility is below some threshold level, such as 50%.[49] Other States, like *Minnesota*, limit the joint and several liability of defendants according to a formula based on their share of the plaintiff's damages.[50] A number of so-called "reallocation" States, such as *Oregon* and *Connecticut*, impose an insolvent tortfeasor's share of liability on some or all of the other defendants.[51] Significantly, in 16 of the 36 States that have modified joint and several liability, shares of comparative fault cannot be assigned to non-parties.[52] And in

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Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997); Idaho Code § 6-803; Maine Code, Title 14, § 156; *Morgan v. Cohen*, 523 A.2d 1003 (Md. 1987); *Allen v. Chance Mfg. Co.*, 873 F.2d 465 (1st Cir. 1989) (interpreting Mass. law); *Hairston v. Alexander Tank & Equip. Co.*, 311 S.E.2d 559 (N.C. 1984); Pa. Code § 7102; *Roberts-Robertson v. Lombardi*, 598 A.2d 1380 (R.I. 1991); *Rourk v. Slevey*, 164 S.E.2d 909 (S.C. 1968); S.D. Codified Laws § 15-8-15.1; *Dickenson v. Tabb*, 156 S.E.2d 795 (Va. 1967); W. Va. Code § 29-12A-7.

48. *See See* Restatement (Third) § 17 at 151& n.6.

49. *See* N.H. Rev. Stat. § 507:7-e; Wisc. Stat. § 895.045(1).

50. *See* Minn. Stat. § 604.02.

51. *See* Oregon Rev. Stat. § 18.485.(4) (reallocation to any defendant whose responsibility exceeds plaintiff's and 25% threshold); *see also* Conn. Gen Stat. § 52-572h(g).

52. *See* Restatement (Third) of Torts, § 17 at 153, 154, 156, 157, 159 (citing state statutes and decisions).

17 of those same 36 States, employers may not be assigned a percentage of comparative responsibility.[53]

Many States, such as *Alaska*, *Arizona*, *Hawaii*, *Illinois*, *Kentucky*, *Michigan*, *Nevada*, *New Jersey*, *Texas*, and *Washington*, have decided to retain joint and several liability in important categories of cases defined by subject matter, including FELA, asbestos, products liability, and medical malpractice. For example: *Arizona* preserves joint liability for one category of cases — cases involving FELA claims;[54] *Hawaii* retains joint and several liability for both economic and noneconomic damages in cases involving, *inter alia*, "[t]oxic and asbestos-related torts" and "[s]trict and products liability torts";[55] *Illinois* has chosen to keep joint liability

> in any action in which the trier of fact determines that the injury or damage for which recovery is sought was caused by an act involving the discharge into the environment of any pollutant, including any waste, hazardous substance, irritant or contaminant, including, but not limited to smoke, vapor, soot, . . . asbestos, toxic or corrosive chemicals, . . . any defendants found liable shall be jointly and severally liable for such damage[56]

Kentucky retains joint and several liability for medical malpractice claims;[57] *Michigan* maintains joint liability for medical malpractice cases;[58] *New Jersey* has chosen to keep a modified system of joint liability for "civil action[s] seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances";[59]

53. *Id.* at 154, 157, 159.
54. *See* Ariz. Rev. Stat. § 12-2506D(3).
55. *See* Hawaii Rev. Stat. § 663-10.9.
56. *See* Ill. Comp. Stat., Ch. 735, para. 5/2-1118.
57. *See* Ky. Rev. Stat. § 304.40-290.
58. *See* Mich. Comp. Laws § 600.6304(6)(a).
59. *See* N.J. Stat. § 2A:15-5.3.

and *Texas* retains joint and several liability where "the claimant's personal injury, property damage, death, or other harm resulted from a toxic tort" and defendant's share of responsibility is at least fifteen percent).[60] Still other States, such as *California* and *Iowa*, have eliminated joint and several liability for noneconomic damages in negligence cases, but have retained it for economic damages.[61] Finally, *New Mexico* has elected to retain joint liability in cases where "sound . . . public policy" supports it.[62]

From this canvas, one point emerges with great clarity: there is substantial variety even among States that have chosen to modify the traditional rule of joint and several liability. The issue of joint and several liability is a heavily policy-laden matter on which the States should remain free to adopt different approaches. In doing so, the States are performing their time-honored function as the "laboratories" of democracy.[63]

This Court would not be justified in announcing a "national consensus" against joint and several liability. This is especially so inasmuch as the Restatement (Third) of Torts: Apportionment of Liability has expressly stated that it "takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent

60. *See* Tex. Civ. Prac. & Rem. Code § 33.013(c) *See also* Alaska Stat. § 46.03.822; Nev. Rev. Stat. §. 41.141(5)(c); Wash. Rev. Code § 4.22.070 (interpreted in *Sophie v. Fibreboard Corp.*, 771 P.2d 711, 727-28 (Wash. 1989)).

61. *See* Cal. Civ. Code § 1431.2 (adopted by Proposition 51, ballot initiative in 1986; *see also id.* § 1431.2 (presumption of joint liability, dating from 1872, for matters not covered by Section 1431.2) Iowa Code § 668.4.

62. *See* N.M. Stat. § 41-3A-1C(1)-(4); *see also Enriquez v. Cochran*, 967 P.2d 1136 (N.M. Ct. App. 1997) (felling large dead trees is an inherently dangerous activity, giving rise to joint and several liability under "public policy" exception); *accord Saiz* v. *Belen Sch. Dist.*, 827 P.2d 102 (N.M. 1992).

63. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

tortfeasors who cause an indivisible injury," and that the issue of what approach to take should be left to the laws of the respective States, inasmuch as "*there is currently no majority rule on this question. . . .*"[64]

Thus, the Restatement (Third) does not suggest that undecided courts or States should adopt a mythical "consensus" view but rather offers the courts and States "five different versions of joint and several, several, and combinations of the two. . . ."[65] Even the agnostic approach taken by the Restatement (Third) has been controversial. Some experts have criticized the Restatement for failing to give greater prominence to joint and several liability and for exaggerating the extent to which States have departed from the basic common-law rule. One leading torts scholar flatly maintains that "the application of joint and several liability for indivisible injury is the dominant rule."[66]

A recent proposal by the NCCUSL also recognizes the divergent approaches taken by the States regarding joint and several liability.[67] Significantly, that proposal is far more

64. Section 17, Comment a (emphasis added).

65. *Id.*

66. Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 619 (2000); *see also id.* at 570

> The Reporters' radical approach allows them to criticize joint and several liability without acknowledging the common law or the underlying policies. Unfortunately, it also allows the ALI to grant its imprimatur to a work that is not a new Restatement. It is instead a critique of joint and several liability without engagement, without the labor of a new Restatement. . . . [T]the Restatement (Third), Apportionment is biased tort reform, designed to benefit two specific clients: the defense bar and the insurance industry.

67. National Conference of Commissioners on Uniform State Laws, Prefatory Note, Uniform Apportionment of Tort Responsibility Act (2002 draft).

nuanced than the "one-size-fits-all" rule of proportionate several liability advanced by petitioner in this case.

Accordingly, this Court would not be justified in enshrining a uniform, national standard of proportionate several liability in FELA. Such a step would amount essentially to judicial legislation — to rewriting FELA from the bench. This Court has recognized that "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."[68] This Court should "not cavalierly 'imped[e] the States' ability to serve as laboratories for testing solutions to novel legal problems.' "[69]

In *amici's* view, States should have the freedom to recognize the virtues of joint and several liability if they choose to do so. For example, joint and several liability allocates the risk that one or more of the responsible tortfeasors might be insolvent on the remaining solvent tortfeasors rather than imposing this risk on the plaintiff. In addition, the burden of identifying and suing other persons who may be jointly and severally liable is borne by the defendants rather than the plaintiff.

By contrast, under petitioner's view, a culpable defendant should be free to reduce its liability by shifting blame to immune, bankrupt, or absent parties who have no incentive to challenge the defendant's assertion that they are responsible for the plaintiff's injury. Moreover, it is unclear whether petitioner's proposed proportionate several liability would apply when supposedly liable non-parties cannot be joined to the action, cross-examined, or even located. As the Montana Supreme Court recently commented in holding that a statute eliminating joint liability for defendants who were deemed to be less than 50% at fault for a plaintiff's injuries violated the Montana constitution's due process clause, such an elimination of joint liability "arbitrarily prejudices plaintiffs by requiring them to

68. *Smith v. Robbins*, 528 U.S. 259, 275 (2000).

69. *Id.* (citation omitted).

exonerate nonparties."[70] Hence, "there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties," particularly when the allocation of fault to nonparties is performed "without any procedural safeguard" ensuring that plaintiffs receive a fair adjudication of their claims.[71]

States adhering to joint and several liability draw support from principles of just responsibility. By definition, a defendant is subject to joint and several liability for the entirety of the plaintiff's damages only if the defendant's tortious conduct was an actual and proximate cause of the entire injury. Thus, joint and several liability applies only to injuries for which each defendant is fully responsible. Indeed, under the rules of causation set forth by the Restatement (Second) of Torts, "any one of a number of persons whose tortious conduct is a substantial factor in causing harm is liable for the harm in the absence of a superseding cause."[72] The defendant is not liable for injuries to which he did not contribute. Nor is he liable if, for reasons of policy or principle, his connection to the injury is considered too remote or minimal to be "proximate."[73]

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70. *Newville v. State of Montana Dept. of Family Services*, 883 P.2d 793, 802 (Mont. 1994).

71. *Id. See also Plumb v. Fourth Judicial District Ct.*, 927 P.2d 1011, 1019-20 (Mont. 1996) (invalidating as unconstitutional nonparty defense created by 1995 amendments on the ground that it was unfair to apportion liability to parties who were not named in the lawsuit and who did not have an opportunity to appear and defend themselves); *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (striking down legislation that, inter alia, modified joint and several liability as an invasion of judicial power over court procedure).

72. Restatement (Second) of Torts § 875, Comment c, at 315 (1979).

73. *See* 3 Fowler V. Harper, *et al.*, THE LAW OF TORTS § 10.1, at 3-7, 11, 17-18 (2d ed. 1986); W. Page Keeton, *et al.*, PROSSER & KEETON ON THE LAW OF TORTS § 47, at 328-29, § 52, at 345-49 (5th ed. 1984).

The numerous States that have chosen to retain joint and several liability recognize that there are sound policy reasons to do so. As the Illinois Supreme Court recently explained,

> [a] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. Rather each defendant whose tortious behavior was an actual and proximate cause of the injury is individually fully responsible for the entire injury.[74]

Here, the Petitioner argues that it is somehow unfair or unreasonable to hold a "50% negligent defendant" liable for "100% of the injury." But in a circumstance where there are two defendants, each of whose negligence is an actual and proximate cause of the plaintiff's entire injury, States may reasonably conclude that there is a logical basis for holding each liable for the sum total of the damages. If one imagines a situation in which there are ten tortfeasors rather than two, and each is an actual and proximate cause of the plaintiff's entire injury, there is no apparent reason why their individual full responsibility should be reduced to only one-tenth of the injury merely because other tortfeasors are also at fault. As Professor Richard W. Wright, one of the five academic advisers to the Restatement (Third) of Torts, has observed, "a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior does not become 'partial' or 'minimal' simply because other defendants' tortious behavior was much worse, individually or in the aggregate."[75]

Hence, petitioner's criticism of joint and several liability reflects a fundamental confusion between each defendant's *individual full responsibility to the plaintiff* for the damages

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74. *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1086-87 (Ill. 1997) (citation and internal quotation marks omitted).

75. Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 59 (1992).

that the defendant tortiously caused and the *comparative responsibility percentages among the defendants*. As the Illinois Supreme Court further explained,

> The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. . . . The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.[76]

As one commentator has opined, saying that a defendant is "50% negligent" is like "saying that someone is '50% pregnant.' "[77] "Rather, each defendant was 100% negligent, each defendant's negligence was an actual and proximate cause of 100% of the injury, and each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury."[78]

To be sure, the defendant who initially pays the plaintiff 100% of damages may well have a contribution, indemnity, restitutionary, or unjust enrichment claim against the other tortfeasors based on their *comparative* responsibility for the injury. But if the defendant cannot pursue that claim because the other tortfeasors are absent, insolvent, or otherwise judgment-proof, this does not mean that the defendant is being held liable for more than he tortiously caused or for more than

76. *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1086 (Ill. 1997) (citation and internal quotation marks omitted).

77. Wright, *Joint and Several Liability*, 23 MEM. ST. U. L. REV. at 56.

78. *Id.* (emphasis in original).

he is responsible. "Whether or not she can obtain contribution, she is individually fully liable to the plaintiff for all the damages that were the actual and proximate result of her tortious behavior."[79] Any unfairness is an issue *among defendants*, not between *plaintiff and defendant*.

Law and economics scholars also recognize important arguments in favor of joint and several liability. For example, Profs. Lewis Kornhauser and Richard Revesz have concluded that negligence rules are efficient under joint and several liability as long as the standard of care for each of the actors is set at the socially optimal level but that negligence rules are not efficient in the absence of joint and several liability.[80] Similarly, Profs. Theodore Eisenberg, Henry Mark, and Stuart Schwab have determined that joint and several liability is more efficient than several liability in inducing optimal social behavior.

> The basic law and economics model suggests that joint and several liability is more efficient than several-only liability. By ensuring that each actor faces the full social costs of its actions, joint and several liability induces optimal behavior. The [economic] models reach less determinate outcomes when insolvency . . . and settlements are considered. But no model shows that several liability is generally more efficient. The [economic] models suggest then, that one should skeptically view empirical claims that several liability is more efficient than joint liability.[81]

In fact, the Restatement (Third) of Torts, citing Professor William Landes and Judge Richard Posner, notes that "recent scholarship has concluded that under certain circumstances joint

79. *Id.* at 61-62.

80. Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 834 (1989).

81. Quoted in Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as It Affects Joint and Several Liability*, 49 EMORY L.J. 565, 574-75 (2000).

and several liability better serves the goal of economic efficiency than does a rule that imposes only several liability."[82]

Petitioner's suggestion that there is a "consensus" regarding proportionate several liability is illusory. There is no reason for this Court to conclude that proportionate several liability is preferable to the traditional common-law rule, and no basis for this Court to enshrine several liability in the FELA.

CONCLUSION

The judgment below should be affirmed.

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82. Restatement (Third) of Torts § 18A, citing W..M. Landes & R.A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEG. STUD. 617 (1980).

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